STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

Supreme Court Case No. 163412
Court of Appeals Case No. 349078
Ingham CC No. 18-00071-AE

APPENDIX: VOLUME 1

CLAIMANT-APPELLANT LEONARD WILSON'S SUPPLEMENTAL BRIEF

Anthony D. Paris (P71525)
John C. Philo (P52721)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
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Attorneys for Claimant-Appellant

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Michigan Unemployment Insurance Agency
File of Claimant, Leonard Wilson

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT
LANSING

STEPHANIE BECKHORN
ACTING DIRECTOR

06/27/2019

Rachael Kohl
Attorney
Po Box 4369
Ann Arbor, MI 48106-4369

Leonard Wilson / Claimant

To Whom It May Concern:

I wish to inform you that MCL 421. 11(b) (1) (iii) provides:

"Except as provided in this act, the information and determination shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding in the programs indicated in subdivision (2)."

Enclosed is the requested information regarding the unemployment claim Leonard Wilson (xxx-xx-6383) If you need additional information, please feel free to contact our office at TIA-FOIA-UI@michigan.gov

Sincerely,

N. Castaneda
Unemployment Claims Examiner
Enclosure(s)

NOTICE: Copies of unemployment insurance records disclosure to you from confidential government records. You are prohibited from making any further disclosure of this information unless further disclosure is expressly permitted by the written authorization of the person to whom it pertains, or as otherwise permitted by law.

UIA 1713 C/E
(Rev. 07-16)
Rick Snyder
GOVERNOR

State of Michigan
Talent Investment Agency
Unemployment Insurance
Michelle Beebe, Senior Deputy Director
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

Authorized By
MCL 421.1 et seq.
Wanda Stokes
TIA Director

CORPORATE COST CONTROL
PO BOX 1180
LONDONDERRY NH 03053-1180

Mail Date: September 20, 2017
Letter ID: L0039846452
EAN: [redacted]
Name: MEIJER GREAT LAKES LIMITED PARTNERSHIP

Request for Information Relative to Possible Ineligibility or Disqualification

Claimant Name: LEONARD WILSON
Social Security Number: [redacted]
Case Number: 10586964
Benefit Year Begin: September 17, 2017

A question of eligibility and/or qualification has been raised on a claim in which you are an interested party. Please respond to the questions on the reverse side of this form. You should keep a copy for your records. The completed form must be received by the UIA within 10 calendar days of the mail date shown. Failure to respond to this request for information will result in issuance of a determination based on available information. In addition, failure to submit adequate and timely responses may result in your account being charged in accordance with Section 20(a), even where the individual is disqualified or ineligible for benefits.

Respond by Mail: UIA
PO Box 169
Grand Rapids MI 49501-0169

Fax: (517) 636-0427

Office of Employer Ombudsman: 1-855-484-2636

TTY Customers: 1-866-366-0004

You can submit "Form UIA 1713, Request for Information Relative to Possible Ineligibility or Disqualification" responses electronically through MiWAM. To access MiWAM, go to www.michigan.gov/uia and click on "Michigan Web Account Manager for Claimants and Employers". If you already have an existing MiWAM account, log in and select the Fact Finding tab. If you do not have an existing MiWAM account, you can create an account by selecting "Register As a New User", and follow the prompts. Online responses must be submitted within 10 calendar days of mail date shown above.

Penalties: If it is determined that you intentionally made a false statement, misrepresented the facts or concealed material information for the purpose of paying or preventing benefits, then the penalty provisions of Section 54 of the Michigan Employment Security (MES) Act will be applied and you will be subject to any or all of the following: You may be required to repay the benefits paid or withheld, and in addition, pay a penalty of three times that amount. If criminally prosecuted, you will be required to pay court costs and fines, face jail time, perform community service, or all or any combination of these.

Letter ID: L0039846452

Additional information is necessary regarding Imprisonment.

On what date was the claimant fired?

The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Who discharged the claimant? Give name and title.

The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Was the discharge due to absences resulting from a violation of law for which the claimant was sentenced to jail or prison?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Please give the reason for discharge.

The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Was the claimant absent due to a conviction for a traffic violation?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Was the claimant absent less than 10 consecutive workdays?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Was the claimant allowed day parole?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Did the claimant report his/her absences?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Was the claimant given disciplinary warnings prior to discharge?

Yes No
The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

Please provide dates and reasons for each infraction. Please submit copies of warnings.

The claimant was fired for excessive attendance violations on 9/3/2017. The final incident was a tardy on 9/3/2017.

You may provide a statement and evidence regarding this issue before a (re)determination is made on this matter. You must provide a response to the questions above and if you failed to previously report this information, explain why. This form must be received by the Agency within 10 calendar days of the mail date shown on page 1. Submit copies (not the originals) of any records which you believe support your position, such as pay stubs, layoff slip, federal income tax form, W-2, etc. If you require additional space, attach additional page(s). Please include the claimant's name and Social Security Number on all documents that you submit.

Certification: I certify that the information I have reported is true and correct to the best of my knowledge and belief. I understand that there are penalties of fines and/or imprisonment and/or community service for false statements as indicated on the front side of this form.

Signature	Date	Telephone Number
Deborah Saksewski	9/19/2017	[redacted]
Print Name	Title	
Deborah Saksewski	Unemployment Representative	

Arabic

أ. "**هام ! يحتوي** هذا المستند (المستندات) على معلومات هامة عن حقوقك الخاصة بتعويضات البطالة، ومسؤولياتك و/أو مخصصاتك، وذلك فمن المهم جدًا أن تفهم البيانات الواردة في هذا المستند.
على الفور: إذا كنت بحاجة إلى مساعدة اتصل بالرقم **1-866-500-0017** للحصول على مساعدة في ترجمة وفهم المعلومات الواردة في المستند (المستندات) التي تلقيتها."

Bengali

***"গুরুত্বপূর্ণ!** এই তথ্যপত্রে আপনার বেকার ভাতা অধিকার, দায়িত্ব এবং/অথবা সুবিধাগুলি সম্পর্কে গুরুত্বপূর্ণ সূচনা দেওয়া আছে। এটা গুরুত্বপূর্ণ যে, এই তথ্যপত্রে থাকা সূচনাগুলি আপনি ভালো করে বুঝে নেবেন।*
***অবিলম্বেঃ** আপনি যে তথ্যপত্র(গুলি) পেয়েছেন এতে থাকা সূচনাগুলি বুঝা এবং অনুবাদের ক্ষেত্রে সাহায্য পেতে প্রয়োজনানুসারে 1-866-500-0017 নম্বরে ফোন করুন।"*

Spanish

¡IMPORTANTE! Este documento(s) contiene información importante sobre sus derechos, obligaciones y/o beneficios de compensación por desempleo. Es muy importante que usted entienda la información contenida en este documento.

INMEDIATAMENTE: Si necesita asistencia para traducir y entender la información contenida en el documento(s) que recibió, llame al 1-866-500-0017.

Mandarin

重要提示！
这份文件包含有关失业补偿的权利、责任和/或利益的重要信息。您需要理解本文件中的信息，这一点至关重要。
立即：如果需要，请拨打1-866-500-0017、可获得帮助，以利您翻译和理解所收到的文件中的信息。

Albanian

1. ***"E RËNDËSISHME!** Ky dokument (dokumente) përmban informacion të rëndësishëm mbi të drejtat, përgjegjësitë dhe/ose përfitimet tuaja nga kompensimi i papunësisë. Është shumë e rëndësishme që ta kuptoni informacionin në këtë dokument.*
2. ***MENJËHERË:** Nëse është e nevojshme, telefononi në numrin 1-866-500-0017 për t'ju ndihmuar me përkthimin dhe kuptimin e informacionit të dokumentin (dokumenteve) që keni marrë."*

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name: Wilson,Leonard A
Emplid: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

Type: Performance Level Decrease
Incident Date: 02/09/2017
Location: 0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: decrease to 3

Action: Attendance

Action Date: 02/13/2017

Team Member Comments:

Incident Status: Closed

Date/Time Discussed : 02/13/2017 9:00

TM Refused to sign

Date/Time Refused:

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name: Wilson,Leonard A
Emplid: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

Type: Performance Level Decrease
Incident Date: 05/01/2017
Location: 0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: Covered level decrease with Leonard on 5/10/17.

Action: Attendance

Action Date: 05/10/2017

Team Member Comments:

Incident Status: Closed

Date/Time Discussed : 05/10/2017 10:59

TM Refused to sign

Date/Time Refused:

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name: Wilson,Leonard A
Emplid: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

Type: Performance Level Decrease
Incident Date: 06/09/2017
Location: 0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: Covered level decrease with Leonard on 6/20/17.

Action: Attendance

Action Date: 06/20/2017

Team Member Comments:

Incident Status: Closed

Date/Time Discussed : 06/20/2017 10:59

TM Refused to sign

Date/Time Refused:

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	06/22/2017
Location:	0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: Discussed this with Leonard on 6/29/17. Currently going to leave Leonard at level 2.

Action: Attendance

Action Date: 06/29/2017

Team Member Comments:

Incident Status:

Date/Time Discussed : 06/29/2017 13:03

TM Refused to sign

Date/Time Refused:

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	08/02/2017
Location:	0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: Covered level decrease on 8/15. Leonard said he will do his best to make sure he is here and on time.

Action: Attendance

Action Date: 08/15/2017

Team Member Comments:

Incident Status: Closed

Date/Time Discussed : 08/15/2017 15:20

TM Refused to sign

Date/Time Refused:

Investing in You

mPerformance

Winning with Our Team through mPerformance

To win with our team we need to invest in our team. At Meijer, we are committed to investing in you. mPerformance is our new approach to managing performance, replacing the current Performance Accountability process that uses "points." mPerformance focuses on recognition for positive behaviors which is a key ingredient in winning teams.

mPerformance provides recognition for positive behavior, builds on a culture of trust between leaders and team members, and encourages higher performance that is aligned with our strategic focus.

There are four performance levels within mPerformance. Team members begin at Level 1 when hired and advance to higher levels based on performance. mPerformance will allow both you and your First Assistant to have clear visibility to your performance level, including recognition as you advance, along with ensuring an effective way to address performance concerns. mPerformance enables leaders to reach the best decisions to help team members be successful when attendance or other performance concerns arise. This includes factoring in your work history to ensure you are at the correct performance level.

Our belief is that all team members will be motivated to reach Level 4, the highest performance level.

We look forward to how mPerformance will provide you more recognition for the important work you complete every day.

Thank you for your commitment to Customers First, Winning with Our Team and your Passion to Compete!

mTeam

Recognizing Our Team

mTeam is our new recognition program–and one more way we are investing in you. It was created to encourage team members to recognize each other for contributions that make a difference, and to encourage leaders to recognize their team's outstanding performance and everyday excellence.

mTeam stands for "together everyone achieves more!" It is an online social platform similar to Facebook and LinkedIn which will allow team members and leaders to recognize anyone in the company at any time.

All mTeam recognition must link to one of these four criteria:

1. Customer First.
2. Win with our Team.
3. Passion to Compete.
4. Safety & Health.

Team members can access the mTeam website from any computer or by downloading the app on their smart device (i.e. smart phone, iPad, etc.).

A companywide launch day event will take place Thursday, September 29 in all Meijer locations. Please stop by the designated space in your unit to learn more about mTeam and to enjoy some free food and giveaway items!

Together Everyone Achieves More!

mTeam is our new online social platform designed to recognize eachother for making a difference! Recognize anyone in the company at anytime.

Examples of when to use mTeam recognition:

1. Embody the company's values.
2. Contribute to a positive work environment.
3. Support others as a learning resource.
4. Go above and beyond to help a customer.

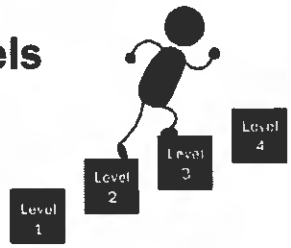
Progressive Discipline

While most team members do not become involved in policy violations or other performance concerns that warrant formal discipline, when these types of situations occur, they are addressed through progressive discipline.

Most concerns are minor in nature and are considered to be less serious, which are addressed formally, but do not result in disciplinary time off without pay. Serious policy violations are addressed formally and include time off without pay.

Please see your First Assistant with any questions.

Increasing Levels



An increase in performance level will automatically occur every 45 days if you remain in good standing.

Good Standing means:

- Be on time.
- Work your scheduled shift.
- Follow policies and rules.
- Meet performance standards.

Decreasing Levels

Team members will decrease one level for:

1. Two absences within 45 days. (Tardiness or an Early Departure = ½ absence.)
2. Frequent or repeated less serious work rule violatons.
3. Any serious policy violation.

Conversion Guidelines

Conversion is determined by:

1. Work Performance & Conduct (WPC)
2. Overall Work Record (OWR)
3. Attendance (ATT)

NOTE: This is not in addition of all three components.

Work Performance & Conduct	
Points	*Go To*
0-5 points	OWR
6-11 points	2

Overall Work Record	
Points	*Go To*
0-11.5 points	ATT
12-13.5 points	3
14-17.5 points	2

Attendance	
Points	*Level*
0-4 points	4
4.5-10 points	3
10.5-11.5 points	2

meijer

Attendance and Attendance Related Conduct

Introduction

The purpose of this policy is to help team members understand how absences are treated at Meijer.

To Whom and When This Policy Applies

This policy applies to all Meijer Stores & Supply Chain team members.

Our Policy

While Meijer's mPerformance system allows leaders the discretion to make limited exceptions to this policy when appropriate, in general, the following guidelines apply. A team member is considered absent when he or she does not work a scheduled shift for any reason, unless the absence was planned and approved by leadership in advance. If a team member misses consecutively scheduled shifts due to a single personal illness or injury, it will be considered 1 absence.

Reporting to work late or leaving prior to the end of a scheduled shift, other than when leadership has, for business reasons, sent the team member home, will each be recorded as a partial (half) absence.

Frequent absences (2 or more absences in 45 days), for reasons other than (1) leaves which have been approved prior to the publishing of a work schedule (2) leaves and absences protected by the Family Medical Leave Act of 1993 (FMLA), or similar state statutes, (see Meijer's policy, *Leaves of Absence)* and (3) absences permitted as reasonable accommodations for disabilities, will be formally addressed through *mPerformance*.

Meijer's attendance policy is designed to provide team members flexibility for life occurrences. Leadership is encouraged to address team members who take advantage of the policy in a manner that negatively impacts Meijer's operations. In addition, the following attendance policy violations may result in application of progressive discipline in combination with reductions in performance levels:

- No Call/No Show
- Not meeting call-off requirements
- Frequent late returns from break
- Patterns of attendance issues contrary to the spirit of the policy

Call-off Requirements

To ensure leadership has adequate notice to cover scheduled shifts, team members are expected to:

- Store team members: provide notice no less than sixty (60) minutes prior to the shift start time.

meijer

- Distribution and Manufacturing team members: provide notice no less than thirty (30) minutes prior to shift start time.
- All team members should notify their leadership of an absence in accordance with the procedures specified by their work location.

"No Call / No Show"

Failure to work scheduled hours without following the process for providing notice of an absence prior to the end of a scheduled shift will be considered a "no call/no show." Each shift for which a team member "no calls/no shows" is a serious performance violation and will result in a one-level decrease in performance level and applicable progressive discipline.

Paid Time Off

If a team member requests a day off in advance and the request was approved, it will not be considered an absence. If a team member is ill or must otherwise "call-off" from a scheduled shift, he or she may request to apply a paid day off to that absence. While the team member will be compensated for the shift, it will still be counted as an absence within *mPerformance*.

It is Meijer's goal to provide team members the tools and information they need for successful careers at Meijer. If you have any questions about this policy please contact your first assistant or Human Resources representative.

Modification Index

Version #	Date / Author	Modification
1.0	*June 2017 / Lauren Cohen*	Policy Redesign

Incident Report

Current Performance Level: 1

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	New Conversion
Incident Date:	09/29/2016
Location:	0086

Covered By: [redacted]

√ **Performance File Viewable**

HR Rep By:

Secondary Type

Comments: Leonard is starting at level 4.

Action: Meeting Report

Action Date: 09/30/2016

Team Member Comments:

Incident Status: Closed

Date/Time Discussed : 09/30/2016 11:07

TM Refused to sign

Date/Time Refused:

Attendance | Work Performance and Conduct

Attendance Points

Person Summary | Employee Detail | ETMPF Summary

Find | View 1 First 1-32 of 32 Last

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 10/04/2016
Shift Length(in mins): 480
Location: 0086
Expiration Date: 10/04/2017

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Consecutive Absence
Comments: Leonard called in sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: [redacted]
Empl ID: 2104592
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 11/04/2016
Time Late(in Mins): 148
Location: 0086
Expiration Date: 11/04/2017

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was authorized a late start, but his schedule was not updated.
*Incident Status: Cancelled
Cancel Reason: Scheduled Outside Availa

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 01/05/2017
Time Late(in Mins): 266
Location: 0086
Expiration Date: 01/05/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was 266 minutes late.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson Leonard A

Incident Information

*Type: Absenteeism

Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000
*Incident Date: 01/07/2017
Location: 0086
Expiration Date: 01/07/2018
Shift Length(in mins): 480

Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
☑ Performance File Viewable
☐ Consecutive Absence
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 01/09/2017
Location: 0086
Expiration Date: 01/09/2018
Shift Length(in mins): 480

Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick
☑ Performance File Viewable
☑ Consecutive Absence
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 02/09/2017
Location: 0086
Expiration Date: 02/09/2018
Shift Length(in mins): 480

Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
☑ Performance File Viewable
☐ Consecutive Absence
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 02/10/2017
Location: 0086
Expiration Date: 02/10/2018
Shift Length(in mins): 480

Covered By: [redacted]
☑ Performance File Viewable

HR Rep ID:

☑ Consecutive Absence

Comments: Leonard called in sick.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 02/11/2017

Time Late(In Mins): 10

Location: 0086

Expiration Date: 02/11/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 10 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 02/27/2017

Time Late(In Mins): 216

Location: 0086

Expiration Date: 02/27/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 216 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 03/05/2017

Time Late(In Mins): 91

Location: 0086

Expiration Date: 03/05/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 91 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 03/07/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 03/07/2018

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Consecutive Absence
Comments: Leonard was given the day off.
*Incident Status: Cancelled
Cancel Reason: Schedule Change after P

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 04/03/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 04/03/2018

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Consecutive Absence
Comments: Called the guard shack at 5:29, suffered from an insulin overdose.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Early Departure
*Incident Date: 04/04/2017
Location: 0086
Expiration Date: 04/04/2018
LessThan Half Shift
MoreThan Half Shift

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Comments: This early departure was approved.
*Incident Status: Cancelled
Cancel Reason: Authorized Early Departu

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]

Incident Information

*Type: Tardiness
*Incident Date: 04/30/2017
Time Late(in Mins): 195

Service Date: 10/15/2014
Unit: 0086
Department: 0000
Location: 0086
Expiration Date: 04/30/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 05/01/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 05/01/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Consecutive Absence
Comments: Leonard called the guard shack at 6:30. sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 05/05/2017
Time Late(in Mins): 242
Location: 0086
Expiration Date: 05/05/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift. He overslept.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 05/14/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 05/14/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Consecutive Absence

Comments: Called the guard shack at 9:41, sick.

***Incident Status:** Closed **Cancel Reason:**

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

***Type:** Absenteeism
***Incident Date:** 06/09/2017 **Shift Length(in mins):** 480
Location: 0086
Expiration Date: 06/09/2018

Covered By: [redacted] ☑ Performance File Viewable
HR Rep ID: ☐ Consecutive Absence
Comments: Called the guard shack at 6:22, sick.

***Incident Status:** Closed **Cancel Reason:**

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

***Type:** Early Departure
***Incident Date:** 06/13/2017
Location: 0086 ◉ LessThan Half Shift ○ MoreThan Half Shift
Expiration Date: 06/13/2018

Covered By: [redacted] ☑ Performance File Viewable
HR Rep ID:
Comments: Leonard had a diabetic attack and we had to call an ambulance.

***Incident Status:** Closed **Cancel Reason:**

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

***Type:** Absenteeism
***Incident Date:** 06/19/2017 **Shift Length(in mins):** 480
Location: 0086
Expiration Date: 06/19/2018

Covered By: [redacted] ☑ Performance File Viewable
HR Rep ID: ☐ Consecutive Absence
Comments: We changed Leonard's schedule, he's gonna work on Thursday instead.

***Incident Status:** Cancelled **Cancel Reason:** Schedule Change after P

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 06/20/2017
Time Late(in Mins): 234
Location: 0086
Expiration Date: 06/20/2018

Covered By: [redacted]
☑ Performance File Viewable
HR Rep ID:
Comments: Leonard was late for his shift on this day
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 06/22/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/22/2018

Covered By: [redacted]
☑ Performance File Viewable
HR Rep ID:
☐ Consecutive Absence
Comments: Leonard called the guard shack at 14:30, sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 06/23/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/23/2018

Covered By: [redacted]
☑ Performance File Viewable
HR Rep ID:
☑ Consecutive Absence
Comments: Called the guard shack at 6:13, sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014

Incident Information

*Type: Early Departure
*Incident Date: 07/21/2017
Location: 0086
○ Less Than Half Shift

Unit: 0086
Department: 0000
Expiration Date: 07/21/2018
MoreThan Half Shift

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard left early on this day because he didn't feel well.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 07/30/2017
Time Late(in Mins): 19
Location: 0086
Expiration Date: 07/30/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 08/02/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 08/02/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Consecutive Absence
Comments: Called in because he was sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 08/13/2017
Time Late(in Mins): 194
Location: 0086
Expiration Date: 08/13/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments:

Leonard called the guard shack at 06.24, said he was going to be late for a personal reason

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 08/15/2017 Time Late(in Mins): 83
Location: 0086
Expiration Date: 08/15/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 09/01/2017 Time Late(in Mins): 459
Location: 0086
Expiration Date: 09/01/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late on this day I allowed him to come in and work 2nd shift so he wouldn't have an absence.

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 09/03/2017 Time Late(in Mins): 3
Location: 0086
Expiration Date: 09/03/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Absenteeism

*Incident Date: 09/04/2017 Shift Length(in mins): 480

Location: 0086

Expiration Date: 09/04/2018

Covered By:

HR Rep ID:

Comments:

☑ Performance File Viewable

☐ Consecutive Absence

*Incident Status: TM Terminated

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Absenteeism

*Incident Date: 09/05/2017 Shift Length(in mins): 480

Location: 0086

Expiration Date: 09/05/2018

Covered By:

HR Rep ID:

Comments:

☑ Performance File Viewable

☑ Consecutive Absence

*Incident Status: TM Terminated

Cancel Reason:

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STATE OF MICHIGAN
IN THE THIRTIETH CIRCUIT COURT FOR THE COUNTY OF INGHAM
GENERAL TRIAL DIVISION

LEONARD WILSON,

Appellant,

ORDER AND OPINION AFFIRMING AGENCY DECISION

v

Case No. 18-711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP and MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Hon. James S. Jamo

Appellees.

At a session of said Court held
in the City of Lansing, County of Ingham,
this 12 Day of April, 2019.

PRESIDING: HONORABLE JAMES S. JAMO, Circuit Court Judge

This matter is before the Court on Appellant Leonard Wilson's claim of appeal of the September 11, 2018 final decision of the Michigan Compensation Appellant Commission affirming the Administrative Law Judge's June 1, 2018 decision, finding that Appellant was ineligible for unemployment benefits under the voluntary leave provision of the Michigan Employment Security Act, §29(1)(a). The parties requested oral argument pursuant to MCR 7.114. In accordance with MCR 7.114(A), this Court determines that the briefs and record adequately present the facts and legal arguments, and this Court's deliberation would not be significantly aided by oral argument. Therefore, this Court declines to schedule oral argument and instead proceeds on the briefs and record alone.

This Court, being fully apprised of the premises, **AFFIRMS** the MCAC's final decision and denies Appellant's request for relief.

FACTS AND PROCEDURAL HISTORY

Appellant began working for Meijer in October of 2014, first as a selector and later as an assistant team member. He generally had a routine schedule, usually starting at 6:45 a.m. each day with Thursdays and Saturdays off, though it was subject to change.

On September 4, 2017, Appellant was arrested on a controlled substances charge and incarcerated at the Clinton County Jail. Although he was arraigned on September 5th and given a cash bond, he was unable to post that bond until September 17th. During that period, he missed work each day from September 4th through September 8th, 2017. On September 4th, he attempted to call Meijer to notify someone that he would not be at work, but Meijer refused to take a collect call. On September 5th, he did make contact with the Meijer "guard shack," where he left a message that he would not be in to work due to "unusual circumstances." He did not speak to his supervisor or anyone in a leadership position. When he was released from the Clinton County Jail on September 17th, he understood that he would no longer have a job at Meijer. Appellant's employment had in fact been terminated effective September 3rd, 2017, which was the last day he appeared for his shift at work. As a result, Appellant applied for unemployment benefits.

On October 2, 2017, the Unemployment Insurance Agency issued a determination that Appellant was ineligible for unemployment benefits because his absences the week of September 4th constituted misconduct. Appellant appealed, and the ALJ ultimately upheld the Agency's determination with a modification—that Appellant was ineligible for benefits, not due to misconduct, but instead due to the voluntary quit provision of the Michigan Employment Security Act, §29(1)(a), because he had three consecutive absences without notice during the week of

September 4th, 2017. Appellant appealed again, and the Michigan Compensation Appellate Commission affirmed the ALJ's ruling. This appeal followed.

STANDARD OF REVIEW

Article VI, Section 28 of the Michigan Constitution provides:

> 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.

This Court's review is therefore limited by the Constitution as well as the Michigan Employment Security Act to whether the Commission's final decision was authorized by law or whether it was supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1). Substantial evidence is "the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 186-87; 682 NW2d 100 (2004). Finally, a reviewing court is not intended to re-examine and re-weigh the evidence to determine whether the decision was objectively correct; is it intended only to determine whether the final decision was lawful and supported by the evidence, even if the court might have reached a different conclusion had it been sitting as the agency below. *Black v Dep't of Social Services*, 195 Mich App 27 (1992).

ANALYSIS

The Michigan Employment Security Act provides that an individual "who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer" is considered to have voluntarily left work without good cause

attributable to the employer. MCL 421.29(1)(a). The individual claiming benefits carries the burden of proof to show that they did in fact leave work involuntarily or for good cause attributable to the employer. *Id.*

Appellant argues that the decision of the Commission was not supported by competent, material, and substantial evidence on the whole record where the record failed to establish that Appellant was absent for three consecutive days constituting voluntary leave under §29(1)(a). First, Appellant argues that the record evidence shows that Appellant was actually terminated on September 5, 2017, because the attendance records list Appellant as a "no call/no show" for the dates of September 4th and September 5th, but make no notations for September 6th, 7th, or 8th. Appellant argues that these records are reasonably interpreted to mean that Appellant was actually terminated on September 5th, which was the day he had left a message with the Meijer guard shack that he would be absent due to "unusual circumstances." However, Appellee notes that the attendance record documents "were never discussed or entered into the record as evidence during the course of Wilson's hearing."[1] This Court's jurisdiction is limited in scope to the "questions of fact and law on the record made before the administrative law judge and the Michigan appellate compensation commission." MCL 421.38. This Court cannot expand the record to review or rely upon documents not reviewed by the ALJ or the Commission.

Even if this Court were to take the attendance records into account, however, Appellant's supervisor testified before the ALJ that Appellant was not terminated until September 8th. This Court's position is not to determine *which* evidence is the most objectively correct; it is only to determine whether the evidence relied upon by the Commission in its final decision was substantial, competent, and material. This Court finds that the supervisor's testimony does

[1] Appellee's Brief in Support, pg. 10.

constitute substantial, competent, and material evidence on the record to establish that Appellant's employment was not terminated until September 8th.

Similarly, Appellant argues that there is not competent, material, and substantial evidence on the whole record to show that he was absent for three consecutive days without notice because there was not substantial evidence to establish that Appellant was scheduled to work on Thursday, September 7th. This Court disagrees. Again, Appellant's supervisor testified that although Appellant typically worked a schedule with Thursdays off, his schedule was subject to change, and on the week in question, he was scheduled to work on Thursday. Again, this Court finds that the supervisor's testimony does constitute substantial, competent, and material evidence on the record to establish that Appellant was scheduled to work on September 7th, for which Appellant was absent.

Finally, Appellant argues that there is not enough competent, material, and substantial evidence on the whole record to establish that he left work voluntarily because he did call in on September 5th and notify his employer of his absence, and he was unable to call in on the other days he was incarcerated. The evidence on the record showed that Appellant called in to the Meijer guard shack and left a message stating that he would not be in due to unusual circumstances on September 5th. Appellant also testified that he was not able to reach his supervisor because Meijer does not accept collect calls, and Appellant did not have the funds to make a general call; he was able to reach the Meijer guard shack on September 5th only because he was given a courtesy call. That same day, Appellant testified that he did attempt to call his supervisor, but his supervisor didn't answer. MCL 421.29(1)(a) requires that notice of absences must be given by contacting an employer "in a manner acceptable to the employer." Appellee notes that Meijer's policy requires an employee to call in at least sixty minutes before the start of their scheduled shift to "notify their

leadership of an absence." [2] It is undisputed that Appellant did not speak directly to his leadership, or that, although he tried to reach his supervisor, he did not leave a message with his supervisor directly. It is undisputed that Meijer does not accept collect calls. It is undisputed that Appellant did not, on September 5th, notify any employee of Meijer that he would be absent because he was incarcerated, or that his absence would be on-going for any period of time. Appellant testified that he had spoken to a guard shack employee in the afternoon of September 5th, well after his shift was supposed to have begun, and asked that employee to pass on the message that he would be absent due to "unusual circumstances."[3] Appellant's supervisor testified that he did not recall having ever been informed that Appellant was incarcerated. This Court therefore finds there is competent, material, and substantial evidence on the whole record to conclude that Appellant did not contact his employer "in a manner acceptable to his employer" regarding September 4th or 5th, and that Appellant did not provide any notice of his continued absence over September 6th, 7th, or 8th.

This Court must therefore affirm the findings of the ALJ and the final decision of the Commission.

IT IS SO ORDERED.

Pursuant to MCR 2.602(A)(3), this Order resolves the last pending claims and closes the case.

Hon. James S. Jamo (P36650)
30th Circuit Court Judge

[2] Appellee's Brief, pg. 12, citing to the Certified Record, pgs. 50-51.
[3] Record at 25.

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on April 12, 2019

Kacie Smith (P78903)
Law Clerk to the Hon. James S. Jamo

STATE OF MICHIGAN
IN THE THIRTIETH CIRCUIT COURT FOR THE COUNTY OF INGHAM
GENERAL TRIAL DIVISION

LEONARD WILSON,

Appellant,

ORDER AND OPINION AFFIRMING AGENCY DECISION

v

Case No. 18-711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP and MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Hon. James S. Jamo

Appellees.

At a session of said Court held
in the City of Lansing, County of Ingham,
this 12 Day of April, 2019.

PRESIDING: HONORABLE JAMES S. JAMO, Circuit Court Judge

This matter is before the Court on Appellant Leonard Wilson's claim of appeal of the September 11, 2018 final decision of the Michigan Compensation Appellant Commission affirming the Administrative Law Judge's June 1, 2018 decision, finding that Appellant was ineligible for unemployment benefits under the voluntary leave provision of the Michigan Employment Security Act, §29(1)(a). The parties requested oral argument pursuant to MCR 7.114. In accordance with MCR 7.114(A), this Court determines that the briefs and record adequately present the facts and legal arguments, and this Court's deliberation would not be significantly aided by oral argument. Therefore, this Court declines to schedule oral argument and instead proceeds on the briefs and record alone.

This Court, being fully apprised of the premises, **AFFIRMS** the MCAC's final decision and denies Appellant's request for relief.

FACTS AND PROCEDURAL HISTORY

Appellant began working for Meijer in October of 2014, first as a selector and later as an assistant team member. He generally had a routine schedule, usually starting at 6:45 a.m. each day with Thursdays and Saturdays off, though it was subject to change.

On September 4, 2017, Appellant was arrested on a controlled substances charge and incarcerated at the Clinton County Jail. Although he was arraigned on September 5th and given a cash bond, he was unable to post that bond until September 17th. During that period, he missed work each day from September 4th through September 8th, 2017. On September 4th, he attempted to call Meijer to notify someone that he would not be at work, but Meijer refused to take a collect call. On September 5th, he did make contact with the Meijer "guard shack," where he left a message that he would not be in to work due to "unusual circumstances." He did not speak to his supervisor or anyone in a leadership position. When he was released from the Clinton County Jail on September 17th, he understood that he would no longer have a job at Meijer. Appellant's employment had in fact been terminated effective September 3rd, 2017, which was the last day he appeared for his shift at work. As a result, Appellant applied for unemployment benefits.

On October 2, 2017, the Unemployment Insurance Agency issued a determination that Appellant was ineligible for unemployment benefits because his absences the week of September 4th constituted misconduct. Appellant appealed, and the ALJ ultimately upheld the Agency's determination with a modification—that Appellant was ineligible for benefits, not due to misconduct, but instead due to the voluntary quit provision of the Michigan Employment Security Act, §29(1)(a), because he had three consecutive absences without notice during the week of

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STANDARD OF REVIEW

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This Court's review is therefore limited by the Constitution as well as the Michigan Employment Security Act to whether the Commission's final decision was authorized by law or whether it was supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1). Substantial evidence is "the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 186-87; 682 NW2d 100 (2004). Finally, a reviewing court is not intended to re-examine and re-weigh the evidence to determine whether the decision was objectively correct; is it intended only to determine whether the final decision was lawful and supported by the evidence, even if the court might have reached a different conclusion had it been sitting as the agency below. *Black v Dep't of Social Services,* 195 Mich App 27 (1992).

ANALYSIS

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attributable to the employer. MCL 421.29(1)(a). The individual claiming benefits carries the burden of proof to show that they did in fact leave work involuntarily or for good cause attributable to the employer. *Id.*

Appellant argues that the decision of the Commission was not supported by competent, material, and substantial evidence on the whole record where the record failed to establish that Appellant was absent for three consecutive days constituting voluntary leave under §29(1)(a). First, Appellant argues that the record evidence shows that Appellant was actually terminated on September 5, 2017, because the attendance records list Appellant as a "no call/no show" for the dates of September 4th and September 5th, but make no notations for September 6th, 7th, or 8th. Appellant argues that these records are reasonably interpreted to mean that Appellant was actually terminated on September 5th, which was the day he had left a message with the Meijer guard shack that he would be absent due to "unusual circumstances." However, Appellee notes that the attendance record documents "were never discussed or entered into the record as evidence during the course of Wilson's hearing."[1] This Court's jurisdiction is limited in scope to the "questions of fact and law on the record made before the administrative law judge and the Michigan appellate compensation commission." MCL 421.38. This Court cannot expand the record to review or rely upon documents not reviewed by the ALJ or the Commission.

Even if this Court were to take the attendance records into account, however, Appellant's supervisor testified before the ALJ that Appellant was not terminated until September 8th. This Court's position is not to determine *which* evidence is the most objectively correct; it is only to determine whether the evidence relied upon by the Commission in its final decision was substantial, competent, and material. This Court finds that the supervisor's testimony does

[1] Appellee's Brief in Support, pg. 10.

constitute substantial, competent, and material evidence on the record to establish that Appellant's employment was not terminated until September 8th.

Similarly, Appellant argues that there is not competent, material, and substantial evidence on the whole record to show that he was absent for three consecutive days without notice because there was not substantial evidence to establish that Appellant was scheduled to work on Thursday, September 7th. This Court disagrees. Again, Appellant's supervisor testified that although Appellant typically worked a schedule with Thursdays off, his schedule was subject to change, and on the week in question, he was scheduled to work on Thursday. Again, this Court finds that the supervisor's testimony does constitute substantial, competent, and material evidence on the record to establish that Appellant was scheduled to work on September 7th, for which Appellant was absent.

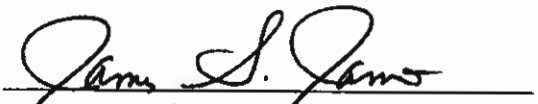
Finally, Appellant argues that there is not enough competent, material, and substantial evidence on the whole record to establish that he left work voluntarily because he did call in on September 5th and notify his employer of his absence, and he was unable to call in on the other days he was incarcerated. The evidence on the record showed that Appellant called in to the Meijer guard shack and left a message stating that he would not be in due to unusual circumstances on September 5th. Appellant also testified that he was not able to reach his supervisor because Meijer does not accept collect calls, and Appellant did not have the funds to make a general call; he was able to reach the Meijer guard shack on September 5th only because he was given a courtesy call. That same day, Appellant testified that he did attempt to call his supervisor, but his supervisor didn't answer. MCL 421.29(1)(a) requires that notice of absences must be given by contacting an employer "in a manner acceptable to the employer." Appellee notes that Meijer's policy requires an employee to call in at least sixty minutes before the start of their scheduled shift to "notify their

leadership of an absence." [2] It is undisputed that Appellant did not speak directly to his leadership, or that, although he tried to reach his supervisor, he did not leave a message with his supervisor directly. It is undisputed that Meijer does not accept collect calls. It is undisputed that Appellant did not, on September 5th, notify any employee of Meijer that he would be absent because he was incarcerated, or that his absence would be on-going for any period of time. Appellant testified that he had spoken to a guard shack employee in the afternoon of September 5th, well after his shift was supposed to have begun, and asked that employee to pass on the message that he would be absent due to "unusual circumstances."[3] Appellant's supervisor testified that he did not recall having ever been informed that Appellant was incarcerated. This Court therefore finds there is competent, material, and substantial evidence on the whole record to conclude that Appellant did not contact his employer "in a manner acceptable to his employer" regarding September 4th or 5th, and that Appellant did not provide any notice of his continued absence over September 6th, 7th, or 8th.

This Court must therefore affirm the findings of the ALJ and the final decision of the Commission.

IT IS SO ORDERED.

Pursuant to MCR 2.602(A)(3), this Order resolves the last pending claims and closes the case.



Hon. James S. Jamo (P36650)
30th Circuit Court Judge

[2] Appellee's Brief, pg. 12, citing to the Certified Record, pgs. 50-51.
[3] Record at 25.

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on April 12, 2019

Kacie Smith (P78903)
Law Clerk to the Hon. James S. Jamo

Certified Record of Proceedings at the Michigan Compensation Appellate Commission

STATE OF MICHIGAN
RICK SNYDER
GOVERNOR
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
SHELLY EDGERTON
DIRECTOR

November 20, 2018

Leonard A. Wilson
519 W. Oakland Ave., Apt. 1
Lansing, MI 48906

Dear Mr. Wilson:

RE: LEONARD A. WILSON, Appellant, vs. MEIJER GREAT LAKES LIMITED, and STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS (LARA), UNEMPLOYMENT INSURANCE AGENCY, Appellees, C.A. No. 18-711-AE, Judge James Jamo:

Enclosed herein is a copy of a Certified Record of Proceedings in the above-entitled appeal, the original of which has been filed with the clerk of the court.

Very truly yours,

Emily Holscher, Clerk

Enclosure

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

LEONARD A. WILSON,
Appellant,
vs.
MEIJER GREAT LAKES LIMITED,
AND STATE OF MICHIGAN,
DEPARTMENT OF LICENSING AND
REGULATORY AFFAIRS (LARA),
UNEMPLYOMENT INSURANCE AGENCY,
Appellees.

C. A. No. 18-711-AE

Leonard A. Wilson,
Appellant In Pro Per

Meijer Great Lakes Limited,
Appellee

Ms. Rebecca Smith (P72184),
Asst. Atty. Gen., repr., the U.A.
TEL: 1-517-335-1950

CERTIFICATION

OF

AND

RECORD OF PROCEEDINGS

BY

MICHIGAN COMPENSATION APPELLATE COMMISSION

State of Michigan
Michigan Compensation Appellate Commission
525 West Allegan Street
P. O. Box 30475
Lansing, Michigan 48909
TEL: 1-517-284-9300

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

LEONARD A. WILSON,
Appellant,
vs.
MEIJER GREAT LAKES LIMITED,
AND STATE OF MICHIGAN,
DEPARTMENT OF LICENSING AND
REGULATORY AFFAIRS (LARA),
UNEMPLOYMENT INSURANCE AGENCY,
Appellees.

C. A. No. 18-711-AE

CERTIFICATION OF RECORD OF PROCEEDINGS

I, Emily Holscher, Clerk do hereby certify that attached hereto is a true and correct copy of the Record in the offices of the Michigan Compensation Appellate Commission in a matter known as Appeal Docket No. **18-010160-256982W** and consisting of the following:

E Holscher

Emily Holscher, Clerk

A copy of the **CERTIFIED RECORD OF PROCEEDINGS**
was mailed this **20th** day of **November**,
A.D., 2018 to the following:
Ingham County Circuit Court
Leonard A. Wilson,
(Appellant In Pro Per)
Meijer Great Lakes Limited,
(Appellee)
Ms. Rebecca Smith(P72184),
Asst. Atty. Gen., repr., the U.A.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

BUREAU OF HEARINGS

DIVISION OF UNEMPLOYMENT APPEALS

LEONARD A. WILSON, CLAIMANT

APPEAL DOCKET NO.: 2018-010160

MEIJER GREAT LAKES LIMITED PARTNERSHIP, EMPLOYER

_____/

Testimony taken and proceedings had in the above-entitled matter before Administrative Law Judge Douglas Wahl, at 25660 West Eight Mile Road, Southfield, Michigan on Thursday, May 31, 2018 commencing at 10:30 a.m.

APPEARANCES:

LEONARD A. WILSON	CLAIMANT
ANITA C. POWELL	CLAIMANT ADVOCATE
TODD WYKES	EMPLOYER WITNESS
STEVEN FOLEY	EMPLOYER WITNESS
TONY SALINAS	EMPLOYER WITNESS
MICHAEL SELLEK	EMPLOYER WITNESS
JANICE K. DANIELS	EMPLOYER ADVOCATE

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(517) 882-0060

256982

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Southfield, Michigan

Thursday, May 31, 2018

* * * * *

P R O C E E D I N G S

ALJ WAHL: This recording is being made on Thursday, May 31, 2018. The time is 10:35 a.m. now. The appeal number, 18-010160. The claimant is Leonard Wilson the employer, Meijer Great Lakes Limited. Call the telephone conference line. It's 10:35. It's nine and then one, 877-848-7030.

(Telephone call)

RECORDED MESSAGE: Welcome to AT&T's teleconference service. Please enter your access code, followed by the pound sign.

ALJ WAHL: It's 1035433.

RECORDED MESSAGE: To join the conference as the host, press star. Otherwise, press pound. Please enter your host password, followed by the pound sign. There are six participants on the call including you. You are joining your conference as the host. For a menu of available commands, press star pound.

ALJ WAHL: Good morning. This is Administrative Law Judge Doug Wahl calling on the Leonard Wilson case. Is Mr. Leonard Wilson in the hearing?

MR. WILSON: Yes, I am.

ALJ WAHL: Okay. Mr. Wilson, and we have an appearance on behalf of the claimant. Ms. Anita C. Powell has filed an appearance. Are you there, Ms. Powell?

MS. POWELL: Good morning, your Honor. I'm here.

ALJ WAHL: Okay, and is there anyone else for the claimant today, Ms. Powell?

MS. POWELL: No, thank you.

ALJ WAHL: Okay. Very good then. We have an appearance from Janice K. Daniels, representing the employer? Are you there, Ms. Daniels?

MS. DANIELS: Yes, I am. Good morning.

ALJ WAHL: Okay, and good morning. And who do you have there with you, Ms. Daniels?

MS. DANIELS: I -- I have -- I should have three gentlemen on the line. Could you announce yourself, please?

MR. WYKES: This is Todd Wykes.

ALJ WAHL: Is that T-O-D -- D, like David, D, like David?

MR. WYKES: Yes, Sir.

ALJ WAHL: And how do you spell your last name, please?

MR. WYKES: W-Y, as in yellow, K-E-S.

ALJ WAHL: Okay, Mr. Wykes and what is your

position there?

MR. WYKES: I'm a System Inventory Control Supervisor.

ALJ WAHL: Let's see. All right. Think you said System Inventory Control Supervisor. Is that right?

MR. WYKES: That is correct.

ALJ WAHL: Okay, thank you. And then who's the next one? Could you give me your first name?

MR. FOLEY: My name is Steven.

ALJ WAHL: Steven, now do you spell that S-T-E-V, like victor, E-N?

MR. FOLEY: Correct.

ALJ WAHL: Okay. And how do you spell your last name?

MR. FOLEY: F-O-L-E-Y.

ALJ WAHL: Okay, Foley. That first letter was F, like Frank, right?

MR. FOLEY: Correct.

ALJ WAHL: Now --

MR. FOLEY: Foley.

ALJ WAHL: Foley. What is your -- yeah, I -- what is your position there?

MR. FOLEY: I'm currently a Manager in Systems and Receiving.

ALJ WAHL: Okay, thank you. And what's the

first name of the next witness? Or are there anymore? I guess maybe that's it. You just have two witnesses today, Ms. Daniels?

MS. DANIELS: I thought that Mr. Sellek was going to be on the line.

(Tone)

ALJ WAHL: Did --

MS. DANIELS: -- as well as Mr. Salinas.

ALJ WAHL: Oh. Is there anyone else besides Mr. Wykes and Mr. Foley for the employer?

MR. SALINAS: Tony Salinas from DF 86.

ALJ WAHL: Okay, Tony. Let's see. How do you spell the last name?

MR. SALINAS: S, as in Sam, A-L-I-N, as in no, A-S, as in Sam.

ALJ WAHL: Okay. Thank you. And what is your position there?

MR. SALINAS: Systems and Inventory Control Manager, DF 86.

ALJ WAHL: Okay, Systems Inventory Control Manager. Okay. All right. Is there -- did you say there's another one, Ms. Daniels -- Sellek?

MS. DANIELS: Is Michael Sellek on the line? Apparently not, that's -- we can move forward, Judge. Thank you.

ALJ WAHL: Okay. All right, let's see. We have one -- now Ms. Powell, you and Mr. Wilson that are on two different separate telephone lines. Is that right?

MS. POWELL: That's correct.

ALJ WAHL: And Ms. -- okay, and all the employer witnesses, you're on a separate telephone line or are some of you together?

UNIDENTIFIED SPEAKER: Separate.

ALJ WAHL: Okay.

UNIDENTIFIED SPEAKER: Separate. I'm on my own.

ALJ WAHL: All right. One, two, three, four, five, six and I'm seven.

RECORDED MESSAGE: There are seven participants on the call, including you.

ALJ WAHL: All right, real good then. This is appeal number 18-010160. The claimant is Leonard Wilson. The employer is Meijer Great Lakes Limited. This is an unemployment compensation hearing taking place by telephone from Southfield, Michigan on Thursday, May 31, 2018 before Administrative Law Judge Doug Wahl. The time now is 10:40 a.m.

We have an appeal from the claimant received on May 14, 2018 that was in response to a redetermination issued by the Michigan Unemployment Insurance Agency on

May 9, 2018. The Unemployment Agency said the claimant filed a late appeal on December 6th, 2017 in response to redetermination that was issued by the Michigan Unemployment Insurance Agency on October 27, 2017.

Let me just see. October 27, 2017 was a Friday. One, two, three, four, 28, 29, 30. The 30th calendar day was Sunday, November 26, so a timely appeal from that redetermination would have been due on -- on or before November 27, 2017. The Unemployment Agency said that Mr. Wilson did not file the appeal until December 6. That's a week and two days later.

And so the first issue for the hearing, Mr. Wilson, is whether or not you filed a timely appeal on or before November 27, 2017 or had good cause to be late. This is all under Section 32(a) of the Michigan Employment Security Act that says that all of the adjudications issued by the Agency have a 30-day protest period and if you don't get your protest in to the Agency within the 30 days, then it become final. The statute also says you can file a late protest within a year and then you'd have to show good cause why you were late.

And so you have the burden of proof on that issue. I'll be swearing in all the witnesses to start the hearing and then we'll be talking to Mr. Wilson first to find out whether or not he filed a timely appeal or

whether he had good cause to be late.

Ms. Powell will be asking Mr. Wilson questions about that issue. The employer has the right to cross-examine him on that issue. And I may have some questions for him on that issue.

And then the other issue is raised by the October 27, 2017 redetermination. And that adjudication, the Michigan Unemployment Insurance Agency found the claimant was fired on September 3, 2017. They found him disqualified from receiving benefits under the Misconduct Provision. That's Section 29 parens (1) parens (b) of the Michigan Employment Security Act.

The employer has the burden of proof on that section to show that the claimant's discharge was for a misconduct connected with the work or for intoxication while at work. And so we'll start with the employer's testimony at that point in the hearing. Ms. Daniels will call her witnesses for testimony. Ms. Powell has the right to cross-examine.

Then we'll take the claimant's testimony. Ms. Powell will be asking Mr. Wilson questions. The employer has the right to cross-examine and then we come back to the employer for any rebuttal testimony, subject to more cross-examination.

Once the hearing is all over, the Record is

closed and we send out a written decision in the United States mail.

Mr. Wilson, can you confirm for me what your current mailing address is, please?

MR. WILSON: Yes, it's 519 West Saginaw -- I mean -- excuse me -- West Oakland, Apartment number 1, Lansing, Michigan 3=48906.

ALJ WAHL: Okay, thank you. And for the employer, we've got Post Office Box 1180 in Londonderry, New Hampshire 03053. Is that still right, Ms. Daniels?

MS. DANIELS: Yes, it is. Thank you.

ALJ WAHL: Now one more housekeeping matter. I did receive 29 pages of documentation from the employer for possible use at the hearing today and let me just ask Ms. Powell. Have you received these documents, Ms. Powell?

MS. POWELL: Yes, your Honor, thank you.

ALJ WAHL: Okay. Oh, good. So we'll take those up as we go through the hearing and let's see -- so let me just ask that the parties now. Mr. Wilson, do you have any questions for me before we start with the sworn testimony? Do you have any questions for me as to what the issues are here, how we're going to proceed?

MR. WILSON: Yes. They're saying something about on September 3rd, that I was fired up under

intoxication. I'm just curious about that.

ALJ WAHL: Well, the --

(Tone)

ALJ WAHL: Oops, somebody dropped out of the hearing. Are you there, Mr. Wilson?

MR. WILSON: Yes, I am.

ALJ WAHL: Ms. Powell, are you there?

MS. POWELL: Yes, I'm here.

ALJ WAHL: And Ms. Daniels, are you there?

MS. DANIELS: Yes, I am.

ALJ WAHL: Mr. Wykes, are you there?

MR. WYKES: Yes, Sir.

ALJ WAHL: Mr. Foley, are you there?

MR. FOLEY: I am.

ALJ WAHL: Mr. Salinas, are you there?

MR. SALINAS: Yes.

ALJ WAHL: Oh, all right. I thought I heard somebody drop out of the conference.

MR. SELLEK: This is Mike Sellek. I joined as well.

ALJ WAHL: Oh, Mr. Sellek came into the conference. Oh, all right.

MR. SELLEK: Yes.

ALJ WAHL: Let me get your name down. Let's see. Yeah, it doesn't tell me whether somebody's leaving

or com -- okay, it's Michael did you say?

MR. SELLEK: Yes, and the last name is Sellek, S-E-L-L-E-K.

ALJ WAHL: Okay, Mr. Sellek, and what is your position there?

MR. SELLEK: I'm a Operations Manager for Meijer.

ALJ WAHL: Operations Manager. Okay, thank you. All right then. Now, let's see. Mr. Wilson, all I can tell you, I guess, is that the first issue is whether or not you filed timely appeal or had good cause to be late and then the other issue is whether or not your discharge was for misconduct and what the -- what the specifics of the reason for the discharge are, I don't know yet. That's the purpose of the hearing is to find out. Do you have any other questions?

MR. WILSON: Not at this moment, Sir.

ALJ WAHL: Okay. Any questions on the employer's side before we get started?

MS. DANIELS: No, thank you.

ALJ WAHL: Let's swear in the witnesses then. Mr. Wilson, Mr. Syke -- Mr. Wykes -- I'm sorry, Mr. Foley, Mr. Salinas and Mr. Sellek, do you all swear or affirm that the testimony you're about to give in this hearing will be the truth, the whole truth and nothing but the

truth? Mr. Wilson?

MR. WILSON: Yes, I do.

ALJ WAHL: Thank you. Mr. Wykes?

MR. WYKES: Yes.

ALJ WAHL: Thank you. Mr. Foley?

MR. FOLEY: Yes.

ALJ WAHL: Thank you. Mr. Salinas?

MR. SALINAS: Yes.

ALJ WAHL: Thank you. And Mr. Sellek?

MR. SELLEK: Yes, I do.

(At this time, witnesses sworn)

ALJ WAHL: All right, very good. All the witnesses have been sworn. And Mr. Wilson, we're going to start with you. Would you state your name for the Record and spell your last name?

MR. WILSON: Yes. Leonard Wilson, W-I-L-S-O-N.

ALJ WAHL: Okay, and what are the last four digits of your social security number?

MR. WILSON: Six, three, eight, three.

ALJ WAHL: Okay. Real good then. Thank you. Go right ahead, Ms. Powell.

MS. POWELL: Thank you.

LEONARD A. WILSON

(Called as a witness, previously sworn, testified as follows):

DIRECT EXAMINATION

BY MS. POWELL:

Q All right. Good morning, Mr. Wilson. Mr. Wilson, do you recall the last day prior to filing unemployment did you work?

A Yes, that would be on September 3rd, two thousand -- 2017.

Q Okay. And the records in the file -- the Unemployment Insurance Agency filed indicates that you did subsequently file a claim with the Unemployment Insurance Agency the week of September 17th of 2017. Is that correct?

A Yes.

Q Okay. And the involved employer being Meijer Great Lakes Limited Partnership. Is that correct?

A Yes.

Q All right. And Mr. Wilson, when you filed your claim with the Unemployment Insurance Agency, were you able to complete the application?

A You're breaking up on me. Did you say complete application?

Q Yes, were you able to complete your application when you filed your claim?

A Yes.

Q Okay. And now, Mr. Wilson -- let's see, I'm going to direct your attention to -- it's called a Notice of a Redetermination that's dated October 27th of 2017. By any chance, do you have that document with you?

A No. I don't.

Q Okay. Well, in that document, it indicated that you were disqualified to receive benefits, that the Unemployment Insurance Agency disqualified you. Do you -- did you receive that notification that's dated October 27th, 2017 notifying you of your disqualification?

A You said on October 27th?

Q Yes, the notice is October 27, 2017. I'm asking you did you receive this notice called the Notice of Redetermination --(multiple speakers)--

A No.

Q Okay. And --

A No.

Q Okay. And Mr. Wilson, on or around October 27th of 2017, did you have an address of [redacted] East Lansing, Michigan 48823-6722?

A Yes.

Q All right. And during that time, did you -- that's where your mail was going?

A Yes.

Q Okay. Now the Unemployment Insurance Agency indicated, Mr. Wilson, that you protested or responded to the October 27th, 2017 notice on December 6th of 2017. Did you ultimately respond to the October 27th notice?

A Yes.

Q Okay. And Mr. Wilson, how did you become aware of this particular notice dated October 27, 2017?

A I -- I went to the Unemployment office in Lansing and they showed me the letter --(multiple speakers)--

Q Okay, and when did you --(multiple speakers)--

A -- excuse me. Go ahead.

Q Okay. And when did you go to the Unemployment Insurance Agency?

A On December 6th, 2017.

Q Okay, and you said you went to the Unemployment Insurance Agency on December 6th for what reason?

A To find out why I did not receive any notice of anything going on.

Q Okay. So let's see. So prior to December 6th of 2017, you had not received notification from the Unemployment Insurance Agency regarding your claim?

A That is correct.

Q All right, and when you went to the Unemployment Insurance Agency on December 6th of 2017, you said you were shown a copy. Were you given a copy or just shown?

A Actually, I was shown and I'm looking for it now, but yes, just shown.

Q Okay, you were shown the copy. All right.

A Yeah.

Q And -- okay. And let's see, the Agency said that you did

protest that December 6th of 2017. So the date that you were shown the copy and the date that you responded to the notice once you were made aware of it was one in the same, December 6th, 2017?

A Yes.

Q Thank you, Mr. Wilson.

MS. POWELL: I have no further questions.

ALJ WAHL: All right, thank you. Now Ms. Daniels, did you want to ask Mr. Wilson any questions?

MS. DANIELS: Yes.

CROSS-EXAMINATION

BY MS. DANIELS:

Q Mr. Wilson, at some point in time, did you get a notice from the Unemployment Insurance Agency that you owed some restitution?

A No.

Q I'm sorry, I didn't understand your answer.

A No -- okay, can you repeat the question for me, please?

Q Yes. At some point, did you get information from the Unemployment Insurance Agency that you owed some restitution?

A On December 6th, yes.

Q Is that what prompted you to go to the Unemployment Insurance Agency?

A No.

Q So you didn't dispute that you owed restitution?

A No. I did not know anything about that.

Q Okay. Thank you.

MS. DANIELS: I don't have any other questions, thank you.

ALJ WAHL: All right. Any followup then, Ms. Powell?

MS. POWELL: No, your Honor, thank you.

ALJ WAHL: Okay then, let's turn to the employer and find out about the separation then. Who did you want to call, Ms. Daniels?

MS. DANIELS: Mr. Todd Wykes.

ALJ WAHL: All right, go right ahead. Mr. Wykes, you're still under oath. Would you state your name for the Record and spell your last name?

MR. WYKES: Yes. This is Todd Wykes. Last name is W-Y-K-E-S.

ALJ WAHL: All right, thank you. Go right ahead.

MR. WYKES: So on --

ALJ WAHL: Wait, wait, wait for the question. Ms. Daniels, did you have a question for Mr. Wykes? Are you there, Ms. Daniels?

MS. DANIELS: Yes.

(Called as a witness, previously sworn, testified as follows):

DIRECT EXAMINATION

BY MS. DANIELS:

Q Mr. Wykes, what is your position with Meijer?

A In a Systems Inventory Control Supervisor at DF 86.

Q And going back to the beginning of September of 2017, were you Mr. -- the claimant's supervisor, Mr. Wilson?

A Yes.

Q And can you tell us when Mr. Wilson began working for Meijer?

A (Inaudible). October 15th of 2014.

Q What was he hired to do?

A Originally, he was hired as a Selector.

Q What was the last day that he worked and performed services?

A Sunday, September 3rd, 2017.

Q What was his job when he last worked?

A He was a Assistant Team Member.

Q And was that full-time or part-time work?

A Part-time.

Q And did he have a set schedule or did his days and hours vary?

A He had -- he had pretty close to a set schedule.

Q And what was that?

A He was -- his start time daily would have been 6:45. He

normally had Thursdays off.

Q What was --(multiple speakers)-- oh, I'm sorry, go ahead.

A Well, I was just going to add and he would have had Saturdays off also.

Q What was his ending rate of pay?

A I'm sorry, I don't have that in front of me.

Q Okay. Was he represented by a union?

A No.

Q Why did his employment come to an end on September -- after -- why did he not work, I should say, after September 3rd, 2017, ultimately? Did he quit, was he discharged, or was he laid off?

A He just quit coming to work. He had two consecutive no call/no shows. September 4th was a no call/no show and then he called the guard shack on September 5th at 9:29 in the morning, stated that he was unable to --(inaudible)--

ALJ WAHL: I can't --(multiple speakers)-- can you speak directly into your phone? He -- he called at 9:29 a.m. and said what?

THE WITNESS: Said that the day before, on the 4th, he said he was not able to contact our Asset Protection people. Those are the people that take our -- our call-ins for the day. And he would not be in that day. And then he had no call/no shows on September 6th, September 7th, September 8th.

BY MS. DANIELS:

Q After he had no call/no shows on September 6th, 7th, and 8th, did you attempt to contact him?

A The following week I attempted to call him twice, got no answers.

Q What actions, if any, did you take then at that time?

A Well, that time, I covered him with my personal assistant. We -- he would have contacted our H.R. Department.

Q And what actions, if any, did you take?

A Well, once we have approval from our H.R. Department, he was -- his employment was terminated and I processed the change status.

Q What was the reason for his termination?

A No call/no shows, three consecutive.

Q After -- you said you tried calling the following week. Did you ever hear from this claimant again?

A I did. Several weeks later, he called me and stated that, "I'm -- I'm assuming my employment, that I no longer have a job." I -- I confirmed that with him, asked him what had happened. He said that he had some personal problems that he had to take care of. So I asked him if everything was okay. He said, yeah, he's doing better. And -- I mean, that's where we left it.

Q Did you have the -- would there be anyone else at the Meijer location where he worked that would have the power

to terminate his employment other than yourself?

A Yeah, my -- my first assistant, Tony Salinas.

Q Okay. All right, thank you.

MS. DANIELS: I don't have any other question of the witness, thank you.

ALJ WAHL: Thank you. Ms. Powell, questions for Mr. Wykes?

MS. POWELL: Yes, thank you.

CROSS-EXAMINATION

BY MS. POWELL:

Q Mr. Wykes, you indicated that Mr. Wilson was discharged for three consecutive days, no call/no show. What were those days?

A Well, that Wednesday, September 6th; Thursday, September 7th; Friday, September 8th.

Q Okay. And now, Mr. Wykes, isn't it true that Mr. Wilson was terminated on September 5th?

A No, actually, the paperwork probably shows Sunday, September 3rd, because that was the last day that he worked.

Q Okay, and did you send any written notification to Mr. Wilson notifying him of -- of his separation?

A I did not. That is not something that I do from my level.

Q All right. Okay, thank you.

MS. POWELL: I have no further questions.

ALJ WAHL: Thank you. Ms. Daniels, more questions for Mr. Wykes?

MS. DANIELS: Yes, just one.

REDIRECT EXAMINATION

BY MS. DANIELS:

Q Mr. Wykes, why -- why does his termination date -- why did you date it for September 3rd?

A That's the way our system is here. They do a change status for a separation following the last day that the team member worked.

Q Thank you.

MS. DANIELS: I don't have any other questions.

ALJ WAHL: Ms. Powell, more questions?

MS. POWELL: No, your Honor, thank you.

ALJ WAHL: Thank you. Ms. Daniels, who did you want to call next?

MS. DANIELS: I'm going to reserve the other witnesses for possible rebuttal testimony. Thank you.

ALJ WAHL: Okay, thank you. Now let's turn to Mr. Wilson then. Ms. Powell, did you want to call Mr. Wilson?

MS. POWELL: Yes, thank you.

LEONARD A. WILSON

(Called as a witness, previously sworn, testified as follows):

REDIRECT EXAMINATION

BY MS. POWELL:

Q Mr. Wilson, again, speaking loud and clear, state your name for the Record.

A Yes. It's Leonard Wilson.

Q Okay, and do you recall your final rate of pay?

A It was thirteen, seventy-five.

Q Okay, was that per hour?

A Yes.

Q And how were you paid? Weekly, bi-weekly, some other time frame?

A Weekly.

Q Okay. All right. All right, and Mr. Wilson, to your understanding, you were ultimately separated from Meijer Great Lakes, is that correct?

A Yes.

Q Okay, and were you made aware of the effective date?

A No.

Q All right. Okay, now the employer indicated that you called on -- I believe it was -- and correct me if I'm wrong -- September 4th, you called the guard shack at 9:29 a.m.?

ALJ WAHL: No, he -- the testimony was September 5, Ms. Powell.

MS. POWELL: Thank you, your Honor.

ALJ WAHL: Mm-hmm.

MS. POWELL: Thank you so much.

BY MS. POWELL:

Q Okay, so strike that question. Mr. Wilson, the employer indicated that you called on September 5, the guard shack at 9:29 a.m.?

A September 5th, yes. The -- the time, no.

Q And what time did you call?

A I believe it was in the afternoon of September 5th.

Q All right. And you -- is -- is -- is there a reason why you called the guard shack and not Mr. Wykes?

A I tried calling Mr. Wykes first and I could not get a answer or response on his phone.

Q Okay. And when you called -- when you were able to -- so you were able to leave a message with the guard shack?

A Yes.

Q Okay, and do you recall what you said?

A Basically that I was in -- I could not make it to work due to unusual circumstances.

Q Okay. And what were those unusual circumstances?

A I was in jail.

Q Okay. All right, and now Mr. Wykes indicated that, at some point, you did make contact with -- with the employer. Is that correct?

A Yes.

Q Okay. And how was that notification made? Was it e-mail,

text, phone, in person?

A Phone, phone.

Q Phone. Okay. And do you recall -- now, Mr. -- Mr. Wykes indicated that you said that you assumed that you had no job, that you had personal problems.

A I asked him about the job and about the personnel -- personal problem, I did not -- I did not say anything about that --(inaudible)-- nothing about that.

Q Okay. Did you indicate to Mr. Wykes that you had been temporarily housed -- incarcerated?

A Yes.

Q Okay. And when you indicated to Mr. Wykes that you had been jailed, did he indicate that he did not believe you?

A No.

Q Okay. Do you recall if he had a response?

A No. Not right off hand, no.

Q Okay. All right, so the day that Mr. Wykes indicated the no call/no show for September 6th, 2017; September 7th, 2017; September 8th, 2017, were those the dates that you were in jail?

A Yes.

Q All right. Thank you, Mr. Wilson. I have no further questions.

ALJ WAHL: Okay. Ms. Daniels?

MS. DANIELS: I don't have any questions of

the claimant, thank you.

ALJ WAHL: Let's see. Hold on just a moment.

EXAMINATION

BY ALJ WAHL:

Q Mr. Wilson, when were you -- when were you picked up by the police?

A September 4th.

Q Okay. All right. A better question would have been when did you go into jail? So that was on Monday, September 4th?

A Yes.

Q Okay. Monday, September 4, 2017. That was Labor Day -- or the day that was celebrated Labor Day. And were you charged? Did they take you in front of a Judge that day for -- to notify you of your charges?

A No.

Q Okay. Was that the next day?

A Yes.

Q What did -- what did they charge you with?

A It was a possession charge.

Q Okay. Possession of a weapon? Drugs?

A Substance.

Q Possession of what?

A Substance. A substance charge.

Q Okay. Possession of a controlled substance?

A Yes.
Q Okay.
A That's a yes.
Q Okay. All right. So that was the charge and then when were you released from the jail?
A I posted bond on the 17th of September.
Q Okay. September 17, 2017, which is a Sunday, posted bond. Okay. All right. Let's see. So you were incarcerated September 4 to September 17. That's seven, eight, nine, ten, eleven, twelve, thirteen days. Okay. In jail 13 days. Okay, and that was just because you were charged with a -- a criminal offense. You had not been -- you didn't -- when you went before the Judge, did you plead not guilty?
A Yes.
Q Okay. Is that still pending today or is that -- that charge been resolved now?
A It's -- it's been resolved.
Q It's been resolved.
A I still -- I still -- yes, yes, resolved, yes.
Q Okay. How -- how was it resolved?
A Pleaded guilty.
Q Oh, all right. Let's see. Pleaded guilty on what day?
A April 16th.
Q April 16 of this year?

A Yes.
Q Okay. All right. And are you -- have you been sentenced yet?
A No.
Q Okay, so that's coming up?
A Yes.
Q When is your sentencing date?
A June 16 -- I mean, excuse me. June 18th.
Q June 18, 2018. Okay. Were you -- were you able to call the employer while you were in jail?
A Yes.
Q Okay. And is -- is there some reason you did not?
A Yeah, they are -- couldn't accept collect calls.
Q Okay. So you -- the only reason -- the only way you could call was by calling collect?
A Yes.
Q Don't accept collect calls. Did you try calling?
A Yes.
Q Okay. Could you -- did you try obtaining some funds from family members or something so that you could call -- pay to make the call, or is that not an option in the jail?
A That is an option and by the time all -- all this had happened, it was -- it -- I was already terminated.
Q Well -- let's see. You had not yet been three days -- in fact, you did call on September 5. How did you call

September 5?

A Courtesy call.

Q What's that mean?

A I was able to get access to a phone.

Q And -- you mean they -- the jail allowed you to make one courtesy call to your employer? Is that what you mean?

A Yeah. Yes.

Q Okay. All right. And how did you post bond?

A I had friends help me get it.

Q Okay. All right. Let's see. This -- you've worked for this employer for a period of time. Did you, in your -- in your phone call to the guard shack on September 5, did you ask to be transferred to anyone who you could request a personal leave of absence, or something of that nature?

A They -- they won't allow that to happen.

Q How do you know that?

A I called before and never got it resolved.

Q Let's see. Did you know about the employer's policy of termination after three days of consecutive no call/no shows?

A Yes. I knew there -- I knew there --(inaudible)-- excuse me. I -- I knew that there was a policy of that, yes.

Q Okay. Let's see. Let me -- my computer just went to sleep on me. Just -- I'm sorry, but everything is electronic here. Just one moment.

(Tone)

ALJ WAHL: Well, we lost someone. Are you there, Mr. Wilson?

THE WITNESS: Yes.

ALJ WAHL: And Ms. Powell, are you there?

MS. POWELL: I'm here, your Honor.

ALJ WAHL: Mr. Wykes, are you there?

MR. WYKES: Yes, I am.

ALJ WAHL: Ms. Daniels, are you there? Ms. Daniels? Let's just wait a minute for her to come back in.

UNIDENTIFIED SPEAKER: Okay.

(Tone)

ALJ WAHL: Okay, is that you, Ms. Daniels?

MS. DANIELS: Yes, it is.

ALJ WAHL: Okay. When I -- we haven't done a single thing since you dropped out so you did not miss anything. Let's see. All right, and so --

BY ALJ WAHL:

Q There's something else I want to check because -- let's see. If -- let me see --(inaudible)-- oh, okay. All right. All right, so sentencing in this matter is not until June 18, 2018. Right, Mr. -- Mr. Wilson?

A Yes.

Q Okay. All right, let's see. Well, let's see, Mr. Wilson,

was there anything else you wanted to add that none of us have asked you?

A Was there any other questions?

Q No, was there any other statement about your separation that you wanted to put on the Record that none of us have asked you?

A Can -- no.

Q Okay.

A No.

ALJ WAHL: Now Ms. Powell, did you have some more questions for Mr. Wilson?

MS. POWELL: I do, just a couple, your Honor.

REDIRECT EXAMINATION

BY MS. POWELL:

Q Okay, Mr. Wilson, let's see, your termination was due to three days no call/no show. That was your understanding by the employer just now?

A Yes.

Q Okay. And now however, September 7th was a Thursday and according to Mr. Wykes, you were off on a Thursday. So the dates that actually would have been only September 6th and September 8th. Is that correct?

A Yes.

Q So that's two days, not three. Is that correct?

A That's correct.

Q Thank you, Mr. Wilson.

MS. POWELL: I have no further questions.

ALJ WAHL: Okay. Ms. Daniels, more questions?

MS. DANIELS: Yes.

RECROSS-EXAMINATION

BY MS. DANIELS:

Q What was your work schedule?

A I -- for that week, I remember working six days that week I had Thursday off.

Q Okay. And then you would have been scheduled for Friday, Saturday, Sunday, Monday?

A Yes.

Q Okay. Thank you.

MS. DANIELS: I don't have any other questions of the witness, thank you.

EXAMINATION

BY ALJ WAHL:

Q Let's see, so you -- wait a minute. Mr. Wilson, so that week you were scheduled to work six days, right?

A Correct.

Q So you were scheduled to work Sunday, September 3, which you worked; Monday, September 4; Tuesday, September 5; Wednesday, September 6; not Thursday, September 7. But you were scheduled for Friday, September 8 and Saturday, September 9?

A Yes.

Q Okay. Did you call or show on September 8 or September 9?

A No.

Q Okay.

ALJ WAHL: More questions, Ms. Powells (ph)?

MS. POWELL: Only -- well -- let's see. One moment, your Honor. No. Not -- not with -- for the --(inaudible)-- thank you, your Honor.

ALJ WAHL: Now Ms. Daniels, more questions for Mr. Wilson?

MS. DANIELS: No, thank you.

ALJ WAHL: Okay. Let's go back to the employer then. Ms. Daniels, did you want to call any of your witnesses?

MS. DANIELS: I just want to recall Mr. Wykes.

ALJ WAHL: Okay, go right ahead.

MS. DANIELS: Thank you.

TODD WYKES

(Recalled as a witness, previously sworn, testified as follows):

REDIRECT EXAMINATION

BY MS. DANIELS:

Q Mr. Wykes, regarding Thursday, September 7th, was Mr. Wilson scheduled to work that date?

A Yes, I do show him scheduled that day. That would have

been his sixth day for the week.

ALJ WAHL: You got to keep your voice right t the microphone. What did you say?

THE WITNESS: Sorry, your Honor. I said yes, my schedule shows him --(inaudible)-- scheduled on Thursday, September 7th. That would have made it six days. We were not scheduled to work on that Saturday.

BY MS. DANIELS:

Q Okay. And when Mr. -- when the claimant called you, you said a few weeks later, and said he had personal issues, did he tell you that he'd been in jail?

A Not that I recall.

Q Thank you.

MS. DANIELS: I don't have any other questions, thank you.

ALJ WAHL: Ms. Powell, did you want to ask Mr. Wykes anymore questions?

MS. POWELL: Just a couple, your Honor, just to clarify.

RECROSS-EXAMINATION

BY MS. POWELL:

Q Mr. Wykes, now earlier you testified that Mr. Wilson had Thursdays and Saturdays off, starting his shift at 6:45. Is that correct?

A No.

Q You did not say that he had Thursdays and Saturdays off earlier?

A I stated that he had most Thursdays off.

Q You did not say -- you didn't add Saturday?

A I did add Saturday, yes.

Q Okay. And your testimony, what was the effective date that you guys terminated Mr. Wilkes -- Mr. Wilson that you stated earlier?

A That would have been -- the effective day would have been Sunday, September 3rd.

Q Thank you.

MS. POWELL: I have no further questions.

ALJ WAHL: Okay. More -- oh, Mr. -- yeah, Ms. -- wait a minute.

EXAMINATION

BY ALJ WAHL:

Q Mr. Wykes, let me ask you this. Does the company -- what is this, Meijer? Does the company offer personal leaves of absence? Can you take a personal leave of absence?

A Yes, depending on the situation. That goes through H.R.

Q Okay, and I -- and would Mr. -- Mr. Wilson, would he have been able to get a personal leave of absence for a -- a short period of incarceration, or don't you know?

A I'm not sure.

Q Not sure, okay. All right.

ALJ WAHL: Let's see. Ms. Daniels, more questions?

MS. DANIELS: No, thank you.

ALJ WAHL: Okay. Ms. Powell, more questions for Mr. Wykes?

MS. POWELL: No. Thank you, your Honor.

ALJ WAHL: Let me see. Offers -- okay, now Ms. Daniels, did you want to call anyone else?

MS. DANIELS: No, thank you.

ALJ WAHL: Okay. Ms. Powell, anything further from the claimant?

MS. POWELL: No, your Honor, thank you.

ALJ WAHL: Okay --(inaudible)-- then. I'll go ahead and close the Record and send out a decision then. You folks have a very good day. Thank you.

MS. POWELL: Thank you, your Honor. Good day to all.

MS. DANIELS: Thank you.

MS. POWELL: Bye bye.

(Hearing concluded.)

(Tape off.)

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I HEREBY CERTIFY that the foregoing testimony and proceedings, consisting of 38 typewritten pages, was mechanically recorded at the time and place hereinbefore set forth; was thereafter reduced to typewritten form; and that the foregoing is a full, true, and correct transcript of the recording so taken.

Linda M. Bacon

Linda Bacon, CER 8970
Theresa's Transcription Service
P.O. Box 21067
Lansing, Michigan 48909-1067
(517) 882-0060

COMPLETED: October 30, 2017

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Division of Unemployment Appeals

SHELLY EDGERTON
DIRECTOR

Date Mailed: May 17, 2018
Appeal Number: 18-010160
Case Number: 10586964
Claimant SSN: [redacted]
Employer No.: [redacted]

NOTICE OF TELEPHONE HEARING

On May 14, 2018, the claimant appealed an Unemployment Insurance Agency (Agency) Adjudication issued on May 09, 2018.

Under Michigan Statutes, MCL 421.33, a hearing will be held before Administrative Law Judge **Douglas Wahl**. This hearing will be held by telephone conference call with the Judge as the host. In order to participate, follow the instructions below. Failure to call in at 10:30 AM may result in you not being able to participate, which may result in an unfavorable decision against you.

Date: Thursday, May 31, 2018
Time: 10:30 AM Eastern Time
Dial In: 877-848-7030
Access Code: 1035433#
After the prompt, press # to connect

The hearing is scheduled for 60 minutes.

Issues to be considered at this hearing:

Section 32a(2)	Whether or not appellant can establish good cause for reconsideration. Underlying issue:
Section 29(1)(b)	Whether claimant is disqualified for benefits under the misconduct connected with work provision. Section 29(1)(a) Voluntary Leaving may apply.
Section 20(a)	Credit to employer; Section 62(a) Restitution/Improper payments may apply.

Please contact the Michigan Administrative Hearing System if you require accommodation for the hearing, such as a sign language interpreter, reader, or any assistive equipment.

File Copy

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Phone: (313) 456-1278| Fax: (517) 763-0140

Interested Parties that were also mailed this notice:

Appellant	LEONARD A WILSON [redacted]
Respondent	MEIJER GREAT LAKES LIMITED PAR PO BOX 1180 LONDONDERRY, NH 03053-1180 OK

File Copy

Case # 0-010-586-464

UIA 1706
(Rev. 8-15)

Rick Snyder
GOVERNOR

RECEIVED
MAY 14 2018

State of Michigan
Talent Investment Agency
Unemployment Insurance Agency
3024 W. Grand Blvd., Detroit, MI 48202
www.michigan.gov/uia

TALENT

Authorized by
MCL 421.1, et seq.

Sharon Moffett-Massey
DIRECTOR

U.I.A.

Mail Date: 5/9/18
Letter ID: [redacted]
CLM ID: [redacted]
Name: Leonard Wilson

Please use black ink when filling out this form.

Check Box if appealing ☑

Appeal of a Redetermination

(This is an Appeal form. If you want to protest a Determination, please use other side.)

Right of Appeal

Any appeal may be filed online through your MiWAM account, or by mail or fax, and must be received within 30 calendar days from the date of issuance of the redetermination. If the 30th day is a Saturday, Sunday, legal holiday or Agency non-work day, the appeal must be received by the Unemployment Insurance Agency (UIA) by the end of the next day which is neither a Saturday, Sunday, legal holiday or Agency non-work day.

If you disagree with a redetermination and want to appeal, request a hearing before an Administrative Law Judge:

- Appeals may be submitted through your MiWAM account or in writing. Clearly state the reason for disagreeing with the redetermination.
- Attach copies of any documents, employer notices, correspondence, or other types of information which may clarify the issue you are appealing. These documents will not be returned, so send duplicates or copies.
- All correspondence must have the Michigan ID number, claimant's name, or the name of the employer. This information can be found at the top of this form.
- If the 30-day appeal period has already lapsed, your statement should indicate why your appeal was not submitted on time.
- You may submit this APPEAL online through your web account, by mail to: UIA, PO Box 124, Grand Rapids, MI 49501-0124 OR by fax to 1-616-356-0739.

1. Do you have information that you did not provided prior to the redetermination? If yes, provide it now. YES ☐ NO ☐
2. Date redetermination was issued: 5/9/18 (Date on Redetermination)

I appeal for the following reasons:

I disagree with the Redetermination, and I would like a hearing with the Judge

If Applicable: I did not appeal within 30 calendar days of when the redetermination was mailed because:

I certify that the information I have provided on this form is true and correct to the best of my knowledge and belief.

Leonard Wilson (Signature)

5/14/2018 (Date)

Important Advocacy Information: After you appeal your redetermination to the Administrative Law Judge, an Advocate may be able to assist you at the hearing. This service is free to unemployed workers and employers. If you are interested in using an Advocate, once you have received your *Notice of Hearing*, call the Advocacy Program at 1-800-638-3994 and press Option 2. Provide the Advocate Representative with the Appeal Number from your *Notice of Hearing* form. Some restrictions in service may apply.

01706150 8

TIA is an Equal Opportunity Employer/Program

UIA 1733
(Rev. 06-17

Authorized by
MCL 421.1 et seq.

RICK SNYDER
GOVERNOR

WANDA STOKES
TIA DIRECTOR

STATE OF MICHIGAN
TALENT INVESTMENT AGENCY
Unemployment Insurance
Michelle Beebe, Senior Deputy Director
3024 W. Grand Blvd., Detroit, MI 48202
www.michigan.gov/uia

Mail Date: 10/27/17
Letter ID:
CLM ID: C4781761-0
Name: Leonard Wilson

Please use black ink when filling out this form.

Check Box if appealing ☐

U.I.A.
Appeal of a Redetermination

(This is an Appeal form. If you want to protest a Determination, please use other side.)

APPEAL RIGHTS

Any appeal must be filed by mail, fax or web account and received within 30 calendar days from the date of mailing. If the 30th day is a Saturday, Sunday, legal holiday, or Unemployment Insurance non-work day, the protest or appeal must be received by the end of the next business day.

If you disagree with a redetermination and want to appeal, requesting a hearing before an Administrative Law Judge:

- You may mail, fax, or submit an online response to the following: UI, P.O. Box 124, Grand Rapids, MI 49501-0124, fax to: 1-616-356-0739, or submit online through your MiWAM account at www.michigan.gov/uia.
- All written appeals must be **signed or verified**; however, Unemployment Insurance (UI) may accept an appeal that lacks a signature if the appeal can be verified by, or on behalf of, the appealing party. If an appeal is not signed or verified, UI will notify you.
- All correspondence must have your name, Social Security number, MIN or claim number and the name of the employer.
- If the 30-day appeal period has already lapsed, your statement must indicate why your appeal was not submitted on time.

---

1. Do you have information that you did not provided prior to the redetermination? YES ☐ NO ☐
   If yes, provide it now.
2. Date redetermination was issued: 10/27/17
   Date on Redetermination

I appeal for the following reasons:
I ~~so~~ couldn't get ahold of my employer to let them know that I was in trouble and couldn't make it to work

If Applicable: I did not appeal within 30 calendar days of when the redetermination was mailed because:
I didn't recieve the information

I certify that the information I have provided on this form is true and correct to the best of my knowledge and belief.

Leonard Wilson
Signature

12-6-2017
Date

Important Advocacy Information: After you appeal your redetermination to the Administrative Law Judge, an Advocate may be able to assist you at the hearing. This service is free to unemployed workers and employers. If you are interested in using an Advocate, once you have received your *Notice of Hearing*, call the Advocacy Program at 1-800-638-3994 and press Option 2. Provide the Advocate Representative with the Appeal Number from your *Notice of Hearing* form. Some restrictions in service may apply.

* 0 1 7 0 6 1 5 0 8 *

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FAX

To:
Fax Number: [redacted]

From: Patricia Smith
Fax Number:
Phone:

Company:

Date: May 23, 2018 Total Pages: 29
Subject: Hearing Documents - Leonard Wilson - 6383 - Appeal # 18-010160

Memo:

Thank you,

Patti Smith
Operations Support
[cid:image001.png@01D38572.29B3EDE0]<http://www.corporatecostcontrol.com/>
psmith@corporatecostcontrol.com<mailto:psmith@corporatecostcontrol.com>
Toll Free 800-207-6926 EXT. 477
Office 727-565-2390
Fax 727-565-2379
[cid:image002.png@01D38572.29B3EDE0]<https://www.linkedin.com/company/corporate-cost-control/>
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UCM Solutions <http://www.corporatecostcontrol.com/solutions/unemployment-cost-control/> | Employment & Income Verification Services<http://www.corporatecostcontrol.com/solutions/employment-income-verification/> | Tax Credits & Incentives<http://www.corporatecostcontrol.com/solutions/tax-credits-and-incentives/> | Other Workforce<http://www.corporatecostcontrol.com/solutions/> Solutions |
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PAGE 1/29 * RCVD AT 5/23/2018 9:48:45 AM [Eastern Daylight Time] * SVR:HCV084RFAXPAA01/10 * DNIS:7630140 * CSID:8002816564 * ANI:8002816564 * DURATION (mm-ss):12-47

meijer

May 23, 2018

VIA FAX 517-763-0140

Michigan Administrative Hearing System

Attention: Administrative Law Judge Douglas Wahl

Re: Claimant: Leonard Wilson
SSN: [redacted]
Appeal No.: 18-010160
Hearing Date: May 31, 2018 at 10:30 AM ET

Dear ALJ Wahl:

We would like to submit the attached documentation as proposed exhibits for the above referenced hearing. These exhibits have been mailed to the claimant on this day by Priority Mail USPS.

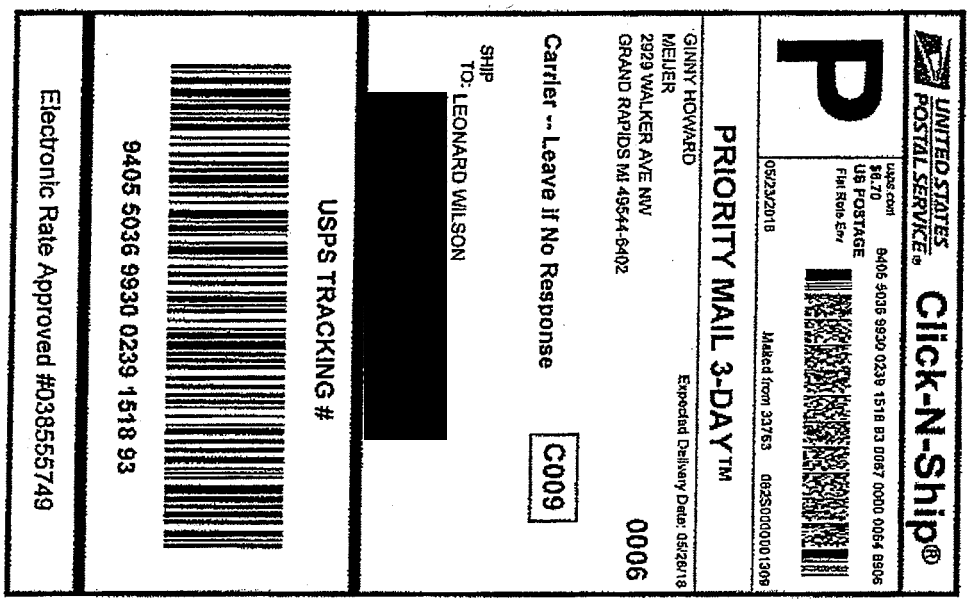
Please contact me with any questions.

Thank you,

Ginny Howard
Meijer Great Lakes
Unemployment Representative
[redacted]

Tracking Numbers: [redacted]

Enclosed: 28 pages



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meijer

May 23, 2018

VIA USPS Priority Mail

Michigan Administrative Hearing System

Attention: Leonard Wilson

Re: Claimant: Leonard Wilson
SSN: [redacted]
Appeal No.: 18-010160
Hearing Date: May 31, 2018 at 10:30 AM ET

Dear Mr(s). Wilson:

We would like to submit the attached documentation as proposed exhibits for the above referenced hearing. These exhibits have been faxed to the judge on this day.

Thank you,

Ginny Howard
Meijer Great Lakes
Unemployment Representative
P (616) 249-6290 | F (616) 735-8864

Tracking Numbers: 9405 5036 9930 0239 1518 93

Enclosed: 29 pages

Incident Report

Current Performance Level: 1 1

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	New Conversion
Incident Date:	09/29/2016
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: Leonard is starting at level 4.

Action: Meeting Report **Action Date:** 09/30/2016

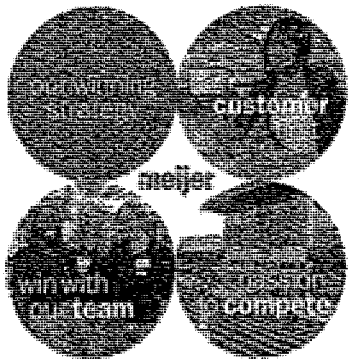
Team Member Comments:

Incident Status: Closed **Date/Time Discussed :** 09/30/2016 11:07 **TM Refused to sign** **Date/Time Refused:**

Investing in You

mPerformance

Winning with Our Team through mPerformance



To win with our team we need to invest in our team. At Meijer, we are committed to investing in you. mPerformance is our new approach to managing performance, replacing the current Performance Accountability process that uses "points." mPerformance focuses on recognition for positive behaviors which is a key ingredient in winning teams.

mPerformance provides recognition for positive behavior, builds on a culture of trust between leaders and team members, and encourages higher performance that is aligned with our strategic focus.

There are four performance levels within mPerformance. Team members begin at Level 1 when hired and advance to higher levels based on performance. mPerformance will allow both you and your First Assistant to have clear visibility to your performance level, including recognition as you advance, along with ensuring an effective way to address performance concerns. mPerformance enables leaders to reach the best decisions to help team members be successful when attendance or other performance concerns arise. This includes factoring in your work history to ensure you are at the correct performance level.

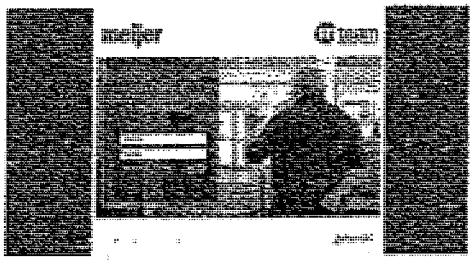
Our belief is that all team members will be motivated to reach Level 4, the highest performance level.

We look forward to how mPerformance will provide you more recognition for the important work you complete every day.

Thank you for your commitment to Customers First, Winning with Our Team and your Passion to Compete!

mTeam

Recognizing Our Team



mTeam is our new recognition program–and one more way we are investing in you. It was created to encourage team members to recognize each other for contributions that make a difference, and to encourage leaders to recognize their team's outstanding performance and everyday excellence.

mTeam stands for "together everyone achieves more!" It is an online social platform similar to Facebook and LinkedIn which will allow team members and leaders to recognize anyone in the company at any time.

All mTeam recognition must link to one of these four criteria:

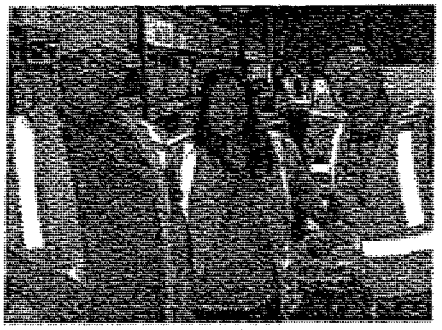
1. Customer First.
2. Win with our Team.
3. Passion to Compete.
4. Safety & Health.

Team members can access the mTeam website from any computer or by downloading the app on their smart device (i.e. smart phone, iPad, etc.).

A companywide launch day event will take place Thursday, September 29 in all Meijer locations. Please stop by the designated space in your unit to learn more about mTeam and to enjoy some free food and giveaway items!

2

Together Everyone Achieves More!



mTeam

mTeam is our new online social platform designed to recognize eachother for making a difference! Recognize anyone in the company at anytime.

Examples of when to use mTeam recognition:

1. Embody the company's values.
2. Contribute to a positive work environment.
3. Support others as a learning resource.
4. Go above and beyond to help a customer.

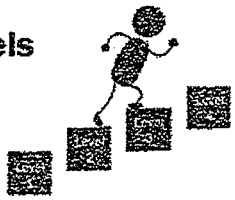
Progressive Discipline

While most team members do not become involved in policy violations or other performance concerns that warrant formal discipline, when these types of situations occur, they are addressed through progressive discipline.

Most concerns are minor in nature and are considered to be less serious, which are addressed formally but do not result in disciplinary time off without pay. Serious policy violations are addressed formally and include time off without pay.

Please see your First Assistant with any questions.

Increasing Levels



An increase in performance level will automatically occur every 45 days if you remain in good standing.

Good Standing means:

- Be on time.
- Work your scheduled shift.
- Follow policies and rules.
- Meet performance standards.

Decreasing Levels

Team members will decrease one level for:

1. Two absences within 45 days. (Tardiness or an Early Departure = ½ absence.)
2. Frequent or repeated less serious work rule violations.
3. Any serious policy violation.

Conversion Guidelines

Conversion is determined by:

1. Work Performance & Conduct (WPC)
2. Overall Work Record (OWR)
3. Attendance (ATT)

NOTE: This is not in addition of all three components.

Work Performance & Conduct	
Points	Go To
0-5 points	OWR
6-11 points	2

Overall Work Record	
Points	Go To
0-11.5 points	ATT
12-13.5 points	3
14-17.5 points	2

Attendance	
Points	Level
0-4 points	4
4.5-10 points	3
10.5-11.5 points	2

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Attendance and Attendance Related Conduct

Introduction

The purpose of this policy is to help team members understand how absences are treated at Meijer.

To Whom and When This Policy Applies

This policy applies to all Meijer Stores & Supply Chain team members.

Our Policy

While Meijer's mPerformance system allows leaders the discretion to make limited exceptions to this policy when appropriate, in general, the following guidelines apply. A team member is considered absent when he or she does not work a scheduled shift for any reason, unless the absence was planned and approved by leadership in advance. If a team member misses consecutively scheduled shifts due to a single personal illness or injury, it will be considered 1 absence.

Reporting to work late or leaving prior to the end of a scheduled shift, other than when leadership has, for business reasons, sent the team member home, will each be recorded as a partial (half) absence.

Frequent absences (2 or more absences in 45 days), for reasons other than (1) leaves which have been approved prior to the publishing of a work schedule (2) leaves and absences protected by the Family Medical Leave Act of 1993 (FMLA), or similar state statutes, (see Meijer's policy, *Leaves of Absence)* and (3) absences permitted as reasonable accommodations for disabilities, will be formally addressed through *mPerformance*.

Meijer's attendance policy is designed to provide team members flexibility for life occurrences. Leadership is encouraged to address team members who take advantage of the policy in a manner that negatively impacts Meijer's operations. In addition, the following attendance policy violations may result in application of progressive discipline in combination with reductions in performance levels:

- No Call/No Show
- Not meeting call-off requirements
- Frequent late returns from break
- Patterns of attendance issues contrary to the spirit of the policy

Call-off Requirements

To ensure leadership has adequate notice to cover scheduled shifts, team members are expected to:

- Store team members: provide notice no less than sixty (60) minutes prior to the shift start time.

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- Distribution and Manufacturing team members: provide notice no less than thirty (30) minutes prior to shift start time.
- All team members should notify their leadership of an absence in accordance with the procedures specified by their work location.

No Call / No Show

Failure to work scheduled hours without following the process for providing notice of an absence prior to the end of a scheduled shift will be considered a "no call/no show." Each shift for which a team member "no calls/no shows" is a serious performance violation and will result in a one-level decrease in performance level and applicable progressive discipline.

Paid Time Off

If a team member requests a day off in advance and the request was approved, it will not be considered an absence. If a team member is ill or must otherwise "call-off" from a scheduled shift, he or she may request to apply a paid day off to that absence. While the team member will be compensated for the shift, it will still be counted as an absence within *mPerformance*.

It is Meijer's goal to provide team members the tools and information they need for successful careers at Meijer. If you have any questions about this policy please contact your first assistant or Human Resources representative.

Modification Index

Version #	Date / Author	Modification
1.0	*June 2017 / Lauren Cohen*	Policy Redesign

Incident Report

Current Performance Level: 1 6

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Tardiness
Incident Date:	09/03/2017
Location:	0086
Time Late in Minutes:	3

Covered By: Wykes,Todd A

√ **Performance File Viewable**

HR Rep By:

Comments: Leonard was late for the start of his shift.

Action Date: 09/05/2017 **Incident Status:** Closed **Date/Time Covered :** 09/05/2017 9:31

Incident Report

Current Performance Level: 1 7

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	02/09/2017
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: decrease to 3

Action: Attendance **Action Date:** 02/13/2017

Team Member Comments:

Incident Status: Closed **Date/Time Discussed :** 02/13/2017 9:00 **TM Refused to sign** **Date/Time Refused:**

Incident Report

Current Performance Level: 1 8

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	05/01/2017
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: Covered level decrease with Leonard on 5/10/17.

Action: Attendance **Action Date:** 05/10/2017

Team Member Comments:

Incident Status: Closed **Date/Time Discussed :** 05/10/2017 10:59 **TM Refused to sign** **Date/Time Refused:**

Incident Report

Current Performance Level: 1 9

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	06/09/2017
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: Covered level decrease with Leonard on 6/20/17.

Action: Attendance **Action Date:** 06/20/2017

Team Member Comments:

Incident Status: Closed **Date/Time Discussed :** 06/20/2017 10:59 **TM Refused to sign** **Date/Time Refused:**

Incident Report

Current Performance Level: 1 10

Details

Team Member Information

Name:	Wilson,Leonard A
EmpId:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	06/22/2017
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: Discussed this with Leonard on 6/29/17. Currently going to leave Leonard at level 2.

Action: Attendance **Action Date:** 06/29/2017

Team Member Comments:

Incident Status: **Date/Time Discussed :** 06/29/2017 13:03 **TM Refused to sign** **Date/Time Refused:**

Incident Report

Current Performance Level: 1 11

Details

Team Member Information

Name:	Wilson,Leonard A
Emplid:	[redacted]
Service Date:	10/15/2014
Unit:	0086
Department:	0000

Incident Information

Type:	Performance Level Decrease
Incident Date:	08/02/2017
Location:	0086

Covered By: [redacted]

√ Performance File Viewable

HR Rep By:

Secondary Type

Comments: Covered level decrease on 8/15. Leonard said he will do his best to make sure he is here and on time.

Action: Attendance **Action Date:** 08/15/2017

Team Member Comments:

Incident Status: Closed **Date/Time Discussed :** 08/15/2017 15:20 **TM Refused to sign** **Date/Time Refused:**

Attendance Work Performance and Conduct

Attendance Points

Person Summary Employee Detail ETMPF Summary

Find | View 3 First 1-32 of 32 Last

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0066
Department: 0000

Incident Information

*Type: Absenteeism
*Incident Date: 10/04/2016
Location: 0066
Expiration Date: 10/04/2017
Shift Length(in mins): 480

Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
☑ Performance File Viewable
☐ Consecutive Absence
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0066
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 11/04/2016
Location: 0066
Expiration Date: 11/04/2017
Time Late(in Mins): 148

Covered By: [redacted]
HR Rep ID:
Comments: Leonard was authorized a late start, but his schedule was not updated.
☑ Performance File Viewable
*Incident Status: Canceled
Cancel Reason: Scheduled Outside Availa

Generate PDF

Team Member Information

Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0066
Department: 0000

Incident Information

*Type: Tardiness
*Incident Date: 01/05/2017
Location: 0066
Expiration Date: 01/05/2018
Time Late(in Mins): 256

Covered By: [redacted]
HR Rep ID:
Comments: Leonard was 256 minutes late.
☑ Performance File Viewable
*Incident Status: Closed
Cancel Reason:

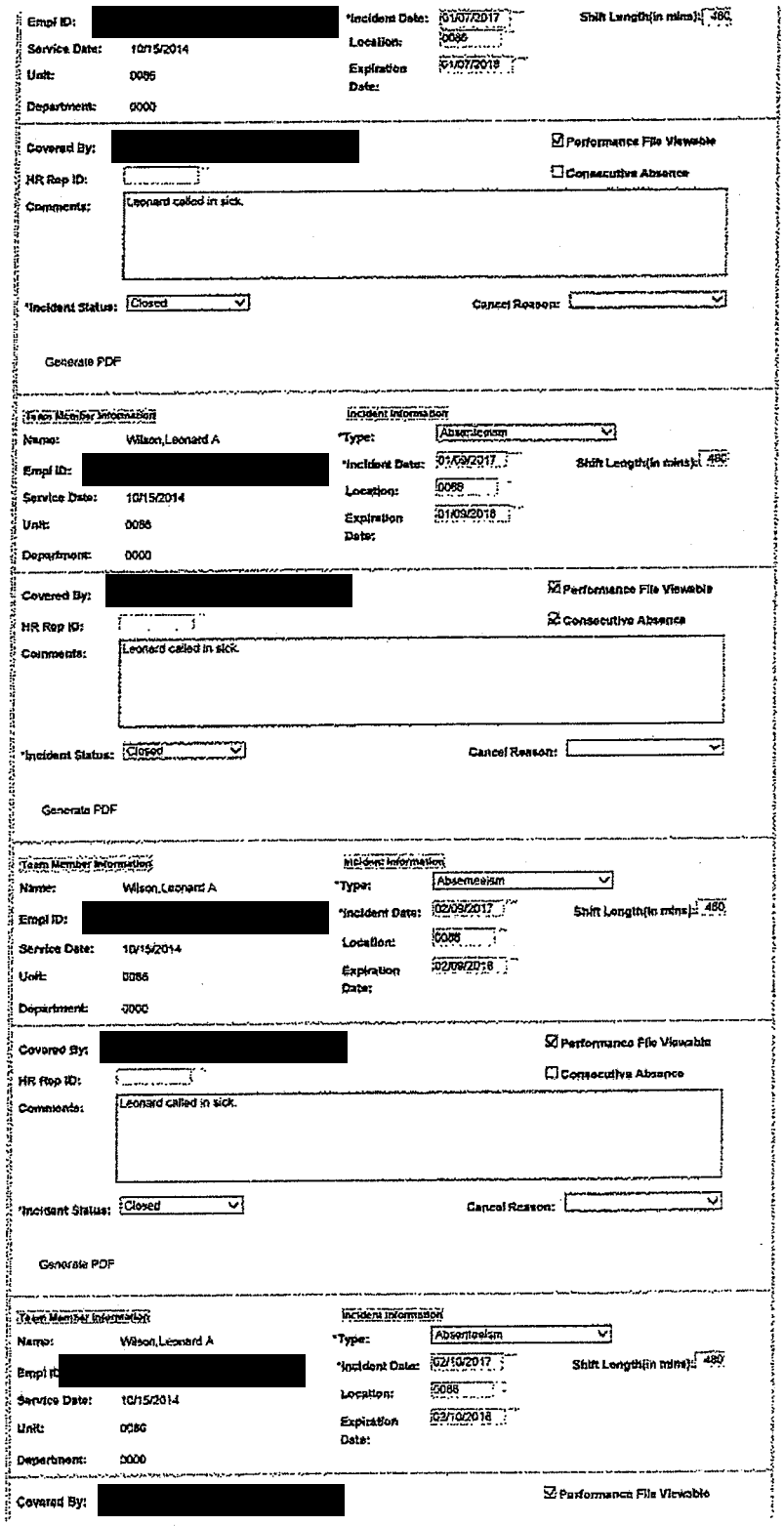
Generate PDF

Team Member Information

Name: Wilson,Leonard A

Incident Information

*Type: Absenteeism



Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000
*Incident Date: 01/07/2017
Location: 0086
Expiration Date: 01/07/2018
Shift Length(in mins): 480
Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
Performance File Viewable
Consecutive Absence
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000
Incident Information
*Type: Absenteeism
*Incident Date: 01/09/2017
Location: 0086
Expiration Date: 01/09/2018
Shift Length(in mins): 480
Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
Performance File Viewable
Consecutive Absence
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000
Incident Information
*Type: Absenteeism
*Incident Date: 02/09/2017
Location: 0086
Expiration Date: 02/09/2018
Shift Length(in mins): 480
Covered By: [redacted]
HR Rep ID:
Comments: Leonard called in sick.
Performance File Viewable
Consecutive Absence
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000
Incident Information
*Type: Absenteeism
*Incident Date: 02/10/2017
Location: 0086
Expiration Date: 02/10/2018
Shift Length(in mins): 480
Covered By: [redacted]
Performance File Viewable

HR Rep ID:

☑ Consecutive Absence

Comments: Leonard called in sick.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 02/11/2017

Time Late(in Mins): 10

Location: 0086

Expiration Date: 02/11/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 10 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 02/27/2017

Time Late(in Mins): 216

Location: 0086

Expiration Date: 02/27/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 216 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Tardiness

*Incident Date: 03/05/2017

Time Late(in Mins): 91

Location: 0086

Expiration Date: 03/05/2018

Covered By: [redacted]

☑ Performance File Viewable

HR Rep ID:

Comments: Leonard was late by 91 minutes.

*Incident Status: Closed

Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 03/07/2017 Shift Length(in mins): 480
Location: 0086
Expiration Date: 03/07/2018

Covered By: [redacted]
HR Rep ID:
Comments: Leonard was given this day off.
Performance File Viewable
Consecutive Absence
*Incident Status: Cancelled
Cancel Reason: Schedule Change after P

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 04/03/2017 Shift Length(in mins): 480
Location: 0086
Expiration Date: 04/03/2018

Covered By: [redacted]
HR Rep ID:
Comments: Called the guard shack at 5:29, suffered from an insulin overdose.
Performance File Viewable
Consecutive Absence
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

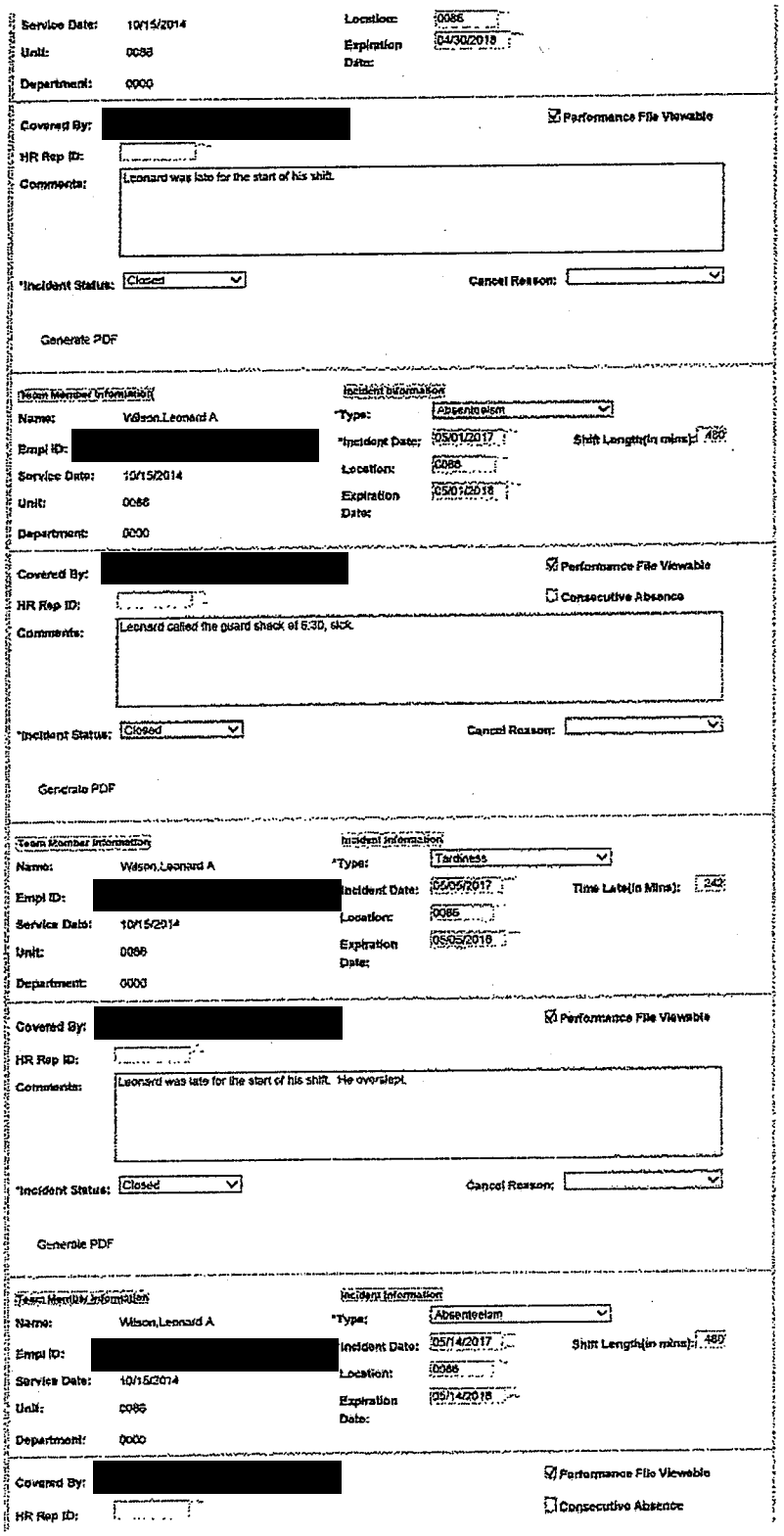
Incident Information
*Type: Early Departure
*Incident Date: 04/04/2017
Location: 0086
Expiration Date: 04/04/2018
Less Than Half Shift
More Than Half Shift

Covered By: [redacted]
HR Rep ID:
Comments: This early departure was approved.
Performance File Viewable
*Incident Status: Cancelled
Cancel Reason: Authorized Early Departu

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]

Incident Information
*Type: Tardiness
*Incident Date: 04/20/2017 Time Late(in Mins): 195



Service Date: 10/15/2014
Unit: 0086
Department: 0000
Location: 0086
Expiration Date: 04/30/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 05/01/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 05/01/2018

Covered By: [redacted]
Performance File Viewable
Consecutive Absence
HR Rep ID:
Comments: Leonard called the guard shack at 6:30, sick.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
Incident Date: 05/05/2017
Time Late(in Mins): 240
Location: 0086
Expiration Date: 05/05/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift. He overslept.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
Incident Date: 05/14/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 05/14/2018

Covered By: [redacted]
Performance File Viewable
Consecutive Absence
HR Rep ID:

PAGE 24/29 * RCVD AT 5/23/2018 9:48:45 AM [Eastern Daylight Time] * SVR:HCV084RFAXPAA01/10 * DNIS:7630140 * CSID:8002816564 * ANI:8002816564 * DURATION (mm-ss):12-47

Comments: Called the guard shack at 9:41. sick

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 05/09/2017 Shift Length(in mins): 480
Location: 0086
Expiration Date: 05/09/2018

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Consecutive Absence
Comments: Called the guard shack at 6:22. sick.

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Early Departure
*Incident Date: 06/13/2017
Location: 0086
Expiration Date: 06/13/2018
Less Than Half Shift
More Than Half Shift

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Comments: Leonard had a diabetic attack and we had to call an ambulance.

*Incident Status: Closed Cancel Reason:

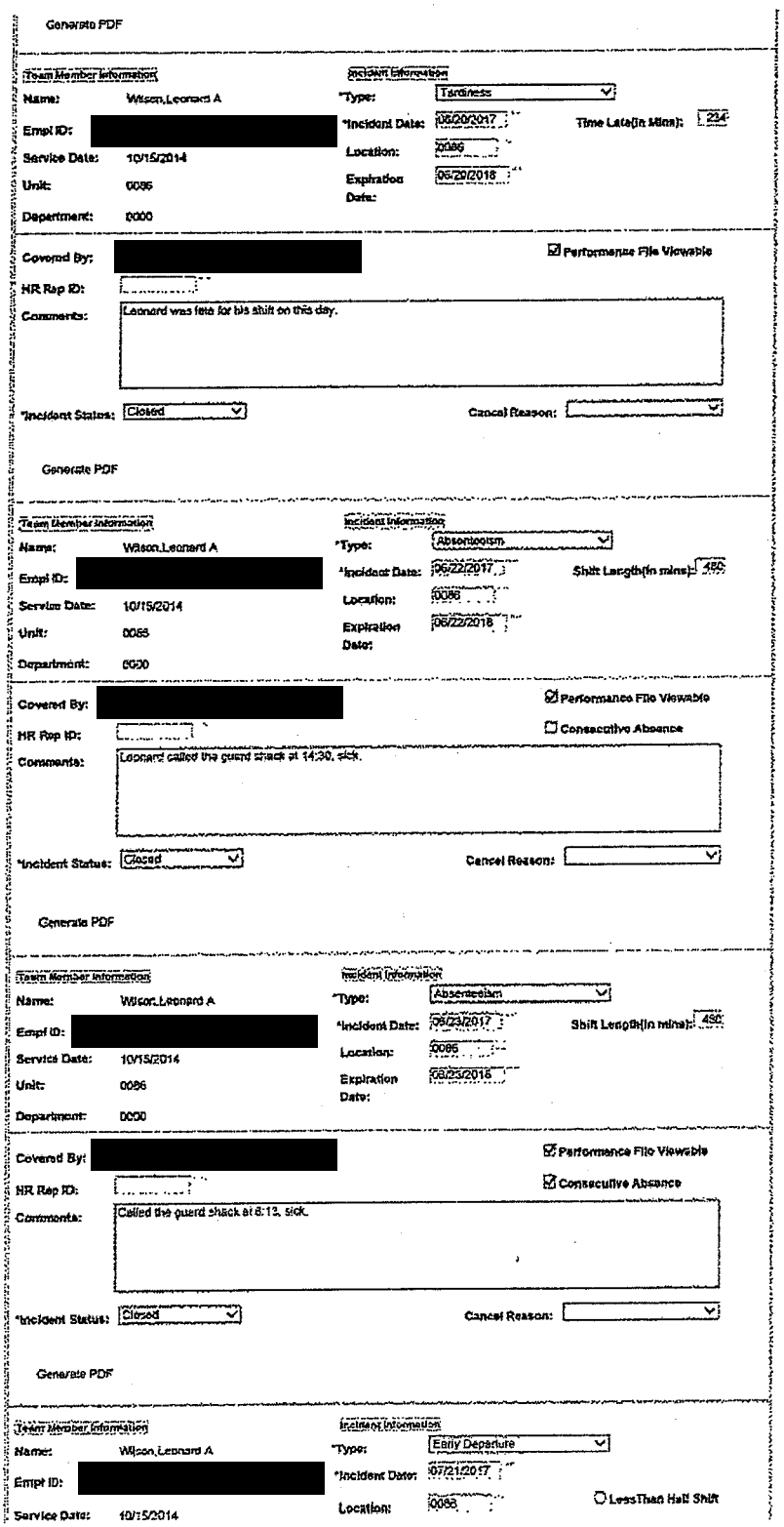
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 06/19/2017 Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/19/2018

Covered By: [redacted]
HR Rep ID:
Performance File Viewable
Consecutive Absence
Comments: We changed Leonard's schedule, he's gonna work on Thursday instead.

*Incident Status: Cancelled Cancel Reason: Schedule Change after P



Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 06/20/2017
Time Late(in Mins): 234
Location: 0086
Expiration Date: 06/20/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for his shift on this day.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 06/22/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/22/2018

Covered By: [redacted]
Performance File Viewable
Consecutive Absence
HR Rep ID:
Comments: Leonard called the guard shack at 14:30, sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

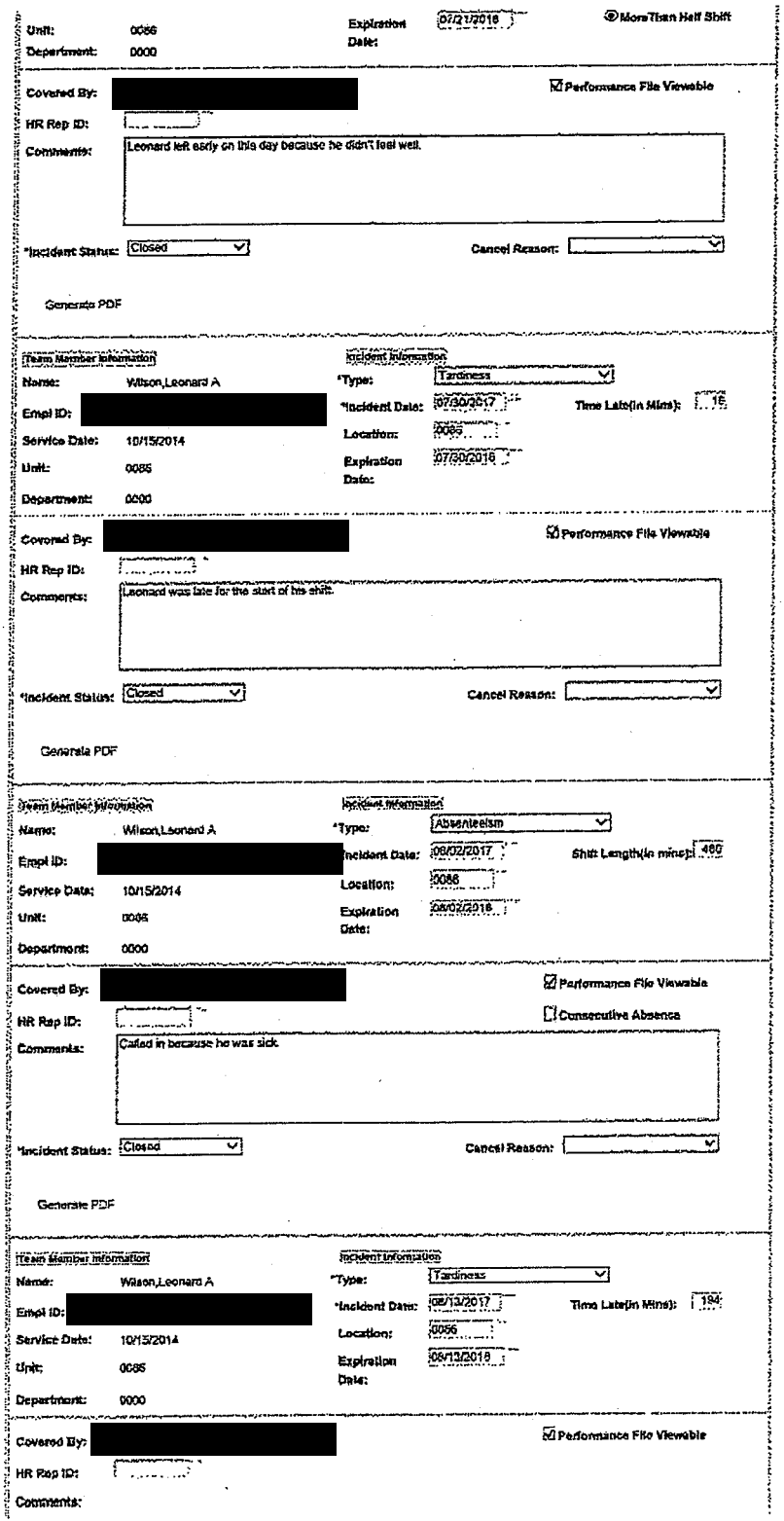
Incident Information
*Type: Absenteeism
*Incident Date: 06/23/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/23/2018

Covered By: [redacted]
Performance File Viewable
Consecutive Absence
HR Rep ID:
Comments: Called the guard shack at 8:13, sick.
*Incident Status: Closed
Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014

Incident Information
*Type: Early Departure
*Incident Date: 07/21/2017
Location: 0086
Less Than Half Shift



Unit: 0086
Department: 0000
Expiration Date: 07/21/2018
More Than Half Shift

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard left early on this day because he didn't feel well.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 07/20/2017
Time Late(in Mins): 15
Location: 0086
Expiration Date: 07/20/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Absenteeism
*Incident Date: 06/02/2017
Shift Length(in mins): 480
Location: 0086
Expiration Date: 06/02/2018

Covered By: [redacted]
Performance File Viewable
Consecutive Absence
HR Rep ID:
Comments: Called in because he was sick.
*Incident Status: Closed
Cancel Reason:
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0086
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 06/13/2017
Time Late(in Mins): 194
Location: 0056
Expiration Date: 06/13/2018

Covered By: [redacted]
Performance File Viewable
HR Rep ID:
Comments:

Leonard called the guard shack at 05:24. said he was going to be late for a personal reason.

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0085
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 08/15/2017 Time Late(in Mins): 63
Location: 0085
Expiration Date: 08/15/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.

*Incident Status: Closed Cancel Reason:

Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0085
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 09/01/2017 Time Late(in Mins): 459
Location: 0085
Expiration Date: 09/01/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late on this day. I allowed him to come in and work 2nd shift so he wouldn't have an absence.

*Incident Status: Closed Cancel Reason:

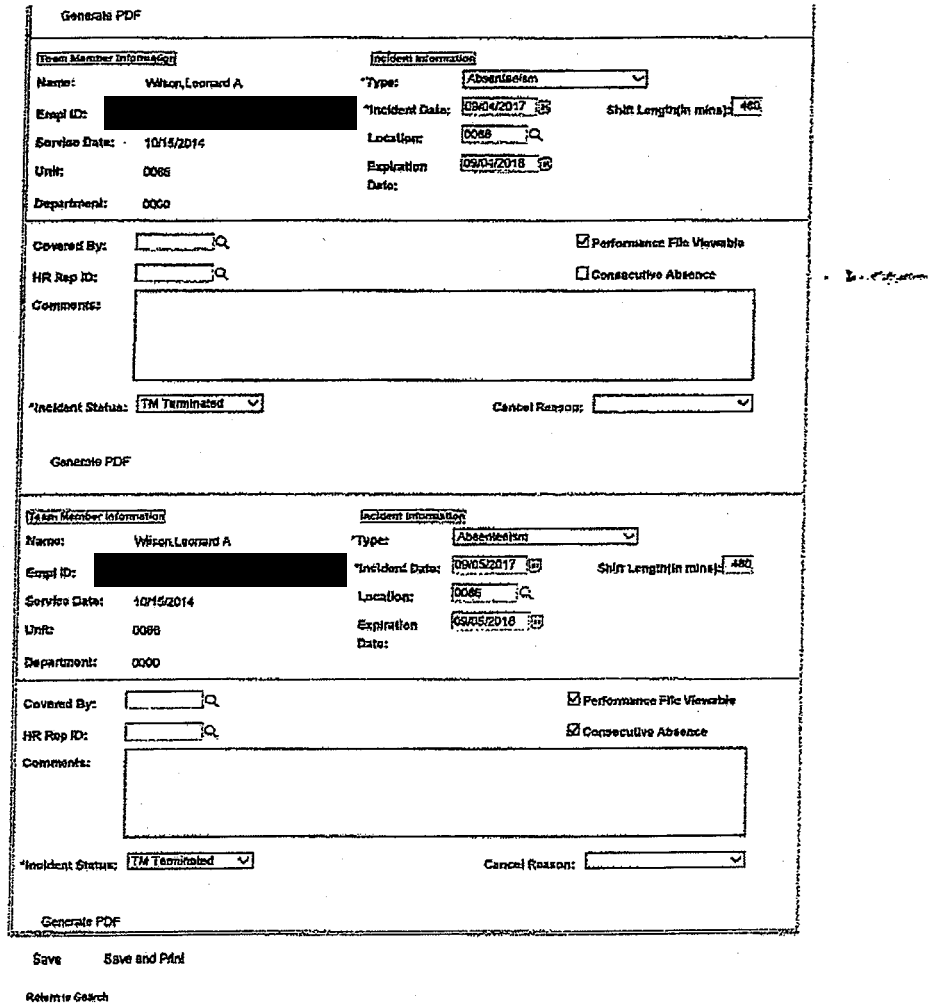
Generate PDF

Team Member Information
Name: Wilson,Leonard A
Empl ID: [redacted]
Service Date: 10/15/2014
Unit: 0085
Department: 0000

Incident Information
*Type: Tardiness
*Incident Date: 09/03/2017 Time Late(in Mins): 3
Location: 0085
Expiration Date: 09/03/2018

Covered By: [redacted] Performance File Viewable
HR Rep ID:
Comments: Leonard was late for the start of his shift.

*Incident Status: Closed Cancel Reason:



Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Absenteeism

*Incident Date: 09/04/2017 Shift Length(in mins): 480

Location: 0086

Expiration Date: 09/04/2018

Covered By:

HR Rep ID:

Comments:

Performance File Viewable

Consecutive Absence

*Incident Status: TM Terminated

Cancel Reason:

Generate PDF

Team Member Information

Name: Wilson,Leonard A

Empl ID: [redacted]

Service Date: 10/15/2014

Unit: 0086

Department: 0000

Incident Information

*Type: Absenteeism

*Incident Date: 09/05/2017 Shift Length(in mins): 480

Location: 0086

Expiration Date: 09/05/2018

Covered By:

HR Rep ID:

Comments:

Performance File Viewable

Consecutive Absence

*Incident Status: TM Terminated

Cancel Reason:

Generate PDF

Save Save and Print

Return to Search

(Rev. 04-16)
Rick Snyder
GOVERNOR

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT
Talent Investment Agency
Unemployment Insurance

MCL 421.1 et seq.
Roger Curtis
TED Director

Wanda M. Stokes
TIA Director

LEONARD A WILSON
[redacted]
LANSING MI 48906-5042

Mail Date: May 9, 2018
Letter ID: L0045784036
CLM: [redacted]
Name: LEONARD A WILSON

Notice of Redetermination

Case Number: 0-010-586-964
BYB: September 17, 2017
Employer Number: [redacted]
Claimant: LEONARD A WILSON
Involved Employer: MEIJER GREAT LAKES LIMITED PARTNERSHIP

Issues and Sections of Michigan Employment Security (MES) Act involved: Redetermination Denied and 32a(2).

Your request for (re)determination of the Poor Attendance issue was received on December 06, 2017. The (re)determination involved was issued on October 27, 2017.

A (re)determination becomes final if no request for reconsideration is received within 30 calendar days from the date of mailing. The Agency may reconsider a prior (re)determination after the 30 day period has expired, if the request is made within one year and good cause is established for the late request. You have not established good cause for your late request for reconsideration.

Your request for reconsideration under Section 32a(2) of the Act is denied.

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this (re)determination, refer to "Protest Rights and Appeal Rights" on the reverse side of this form.

(Rev. 11-14)
Rick Snyder
GOVERNOR

Talent Investment Agency
Unemployment Insurance
Michelle Beebe, Senior Deputy Director
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

TALENT
INVESTMENT AGENCY

MCL 421.1 et seq.
Wanda Stokes
TIA Director

LEONARD A WILSON
[redacted]
EAST LANSING MI 48823-6722

Mail Date: October 27, 2017
Letter ID: L0040579859
CLM: [redacted]
Name: LEONARD WILSON

Notice of Redetermination

Case Number: 0-010-586-964
SSN: [redacted]
Claimant: LEONARD WILSON

BYB: September 17, 2017
Employer Number: [redacted]
Involved Employer: MEIJER GREAT LAKES LIMITED PARTNERSHIP

Issues and Sections of Michigan Employment Security (MES) Act involved: Misconduct and 29(1)(b).

You protested a determination issued on October 02, 2017 regarding Poor Attendance holding you disqualified for benefits. You were fired from MEIJER GREAT LAKES LIMITED PARTNERSHIP on September 03, 2017 for excessive attendance violations.

No new or additional evidence has been provided to warrant a reversal in the prior determination. Therefore, the previous determination is affirmed. Disciplinary action had been initiated prior to your being fired. You did not properly notify your employer about your last absence which was due to other personal reasons over which you had control. Misconduct in connection with work has been established.

You are disqualified for benefits under MES Act, Sec. 29(1)(b). Rework begins with week ending September 16, 2017. You will not receive benefits until you satisfy the rework requirement.

Rework Requirements: Claimant is disqualified until completion of a $5,372.00 earnings rework requirement which has not been satisfied.

Pursuant to Section 20(a) if an employer has established a pattern of failing to provide timely or adequate information in response to Agency requests for the purpose of making proper adjudications of claims/issues; the employer's account will not be credited for benefits paid prior to the date that the protest providing timely or adequate information was received.

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this redetermination, refer to Appeal Rights" on the reverse side of this form.

(Rev. 11-14)
Rick Snyder
GOVERNOR

Talent Investment Agency
Unemployment Insurance
Michelle Beebe, Senior Deputy Director
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

TALENT
INVESTMENT AGENCY

MCL 421.1 et seq.
Wanda Stokes
TIA Director

LEONARD A WILSON
[redacted]
EAST LANSING MI 48823-6722

Mail Date: October 27, 2017
Letter ID: L0040579859
CLM: [redacted]
Name: LEONARD WILSON

(Rev. 11-14)
Rick Snyder
GOVERNOR

Talent Investment Agency
Unemployment Insurance
Michelle Beebe, Senior Deputy Director
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

TALENT
INVESTMENT AGENCY

MCL 421.1 et seq.
Wanda Stokes
TIA Director

LEONARD A WILSON
[redacted]
EAST LANSING MI 48823-6722

Mail Date: October 2, 2017
Letter ID: L0040175195
CLM: [redacted]
Name: LEONARD WILSON

Notice of Determination

Case Number: 0-010-586-964
SSN: [redacted]
Claimant: LEONARD WILSON

BYB: September 17, 2017
Employer Number: [redacted]
Involved Employer: MEIJER GREAT LAKES LIMITED PARTNERSHIP

Issues and Sections of Michigan Employment Security (MES) Act involved: Misconduct and 29(1)(b).

You were fired from MEIJER GREAT LAKES LIMITED PARTNERSHIP on September 03, 2017 for excessive attendance violations.

Disciplinary action had been initiated prior to your being fired. You did not properly notify your employer about your last absence which was due to other personal reasons over which you had control. Misconduct in connection with work has been established.

You are disqualified for benefits under MES Act, Sec. 29(1)(b). Rework begins with week ending September 16, 2017. You will not receive benefits until you satisfy the rework requirement.

Rework Requirements: Claimant is disqualified until completion of a $5,372.00 earnings rework requirement which has not been satisfied.

Pursuant to Section 20(a) if an employer has established a pattern of failing to provide timely or adequate information in response to Agency requests for the purpose of making proper adjudications of claims/issues; the employer's account will not be credited for benefits paid prior to the date that the protest providing timely or adequate information was received.

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this determination, refer to "Protest Rights" on the reverse side of this form.

Michigan Administrative Hearing System
P.O. Box 30695
Lansing, MI 48909-8195

Form 1850

LICENSING AND REGULATORY AFFAIRS
CUSTOMER DRIVEN. BUSINESS MINDED.

Docket No.: 18-010160
Case No.: 10586964
Employer: MEIJER GREAT LAKES LIMITED PAR
Claimant: LEONARD A WILSON
SSN: [redacted]

This is an important legal document. Please have someone translate the document.

এটি একটি গুরুত্বপূর্ণ আইনি দলিল, অনুগ্রহ করে কেউ দলিলটিকে অনুবাদ করুন।

Este es un documento legal importante. Por favor, haga traducir este documento.

هذه وثيقة قانونية هامة، يرجى من شخص ما ترجمة الوثيقة.

Ito ay isang mahalagang legal na dokumento. Mangyari lamang na magkaroon ng isang tao isalin ang dokumento.

LEONARD A WILSON
[redacted]
LANSING, MI 489065042

ORDER

The Agency's May 9, 2018 Adjudication is reversed.

The claimant established good cause for a late appeal under Section 32a(2) of the Michigan Employment Security Act (Act).

The Agency's redetermination issued on October 27, 2017 is modified.

The claimant is disqualified from receiving benefits under the voluntary leaving provision, Section 29(1)(a) of the Act, beginning the week ending September 9, 2017.

The claimant is not disqualified from receiving benefits under the misconduct provision, Section 29(1)(b) of the Act.

The claimant is required to requalify for benefits by rework under Section 29(3) of the Act, beginning September 10, 2017, as directed by the Agency.

Further determinations consistent with this decision are left to the Agency.

Douglas Wahl

Decision Date: June 1, 2018

DOUGLAS WAHL
ADMINISTRATIVE LAW JUDGE

PARTICIPANTS

		05-31-18					
		Sworn		Sworn		Sworn	
Claimant	LEONARD A WILSON	X	X				
Representative	ANITA C. POWELL, Advocate for Claimant	X					
Witness							
Witness							
Witness							
Witness							
Employer	TODD WYKES, System Inventory Control Supr	X	X				
Representative	JANICE K. DANIELS, Advocate for Employer	X					
Witness	STEVEN FOLEY, Manager	X	X				
Witness	TONY SALINAS, Systems Inventory Control Mgr	X	X				
Witness	MICHAEL SELLEK, Operations Manager	X	X				
Witness							
Witness							
Witness							

EXHIBITS

NO	SUBMITTED BY UIA	E	C	DOCUMENT DATED	FORM NO	DOCUMENT DESCRIPTION

JURISDICTION

On May 14, 2018, the claimant timely appealed a May 09, 2018 Unemployment Insurance Agency (Agency) Adjudication which held the claimant filed a late appeal without good cause under Section 32a(2) of the Michigan Employment Security Act (Act).

In a redetermination issued on October 27, 2017, the Agency found the claimant disqualified from receiving benefits under the misconduct provision, Section 29(1)(b) of the Act. Requalification by rework was also required under Section 29(3). The voluntary leaving provision, Section 29(1)(a) of the Act was included in the notice of hearing as a possible issue for the hearing.

ISSUES

Did the claimant file a timely protest/appeal or did the claimant have good cause to be late within a year under Section 32a of the Act? Is the claimant disqualified for unemployment benefits because of a discharge for misconduct connected with work, pursuant to Section 29(1)(b) of the Act? Is the claimant disqualified under Section 29(1)(a) of the Act?

APPLICABLE LAW

Section 32a of the Act provides in part:

> (2) The unemployment agency may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue.

Section 29 of the Act, MCL 421.29, provides in part:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to

have voluntarily left work without good cause attributable to the employer. ... An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. ... .

(b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.

The employer has the burden of demonstrating misconduct by a preponderance of the evidence. *Fresta v Miller*, 7 Mich App 58, 63-64 (1967).

FINDINGS OF FACT

The claimant did not see or receive the redetermination dated October 27, 2017, at or about the time it was issued. The claimant did not see it until he visited an Agency office on December 6, 2017, and he filed his appeal the same day.

The claimant worked for the employer from October 15, 2014 until his last day of work on Sunday, September 3, 2017. The claimant was scheduled to work every day that week, except Saturday, September 9, 2017. The claimant was a no call, no show on September 4, 2017, and on September 6, 7, and 8, 2017. The claimant called the employer on September 5, 2017 and left a message with the guard shack that he was unable to call on September 4, 2017, and that he would be unable to work that day.

The claimant was incarcerated in the county jail on September 4, 2017 and was charged with a criminal offense. He was able to post bond and leave the jail on September 17, 2017. The claimant has pled guilty to the offense but has not yet been sentenced. The employer terminated the claimant's employment after three days of no call, no show, pursuant to the employer's policy of termination upon the occurrence of three days of no call, no show. The claimant knew about the policy.

The employer does provide leaves of absence for personal reasons, but the claimant did not apply for one. The claimant was provided a "courtesy call" by the jail, and there therefore able to call the employer late on September 5, 2017, but he did not have the funds to call on other days, and the employer would not accept collect calls. The claimant was able to post bond with the assistance of friends who loaned him the money.

REASONING AND CONCLUSIONS OF LAW

The first issue for the hearing was whether the claimant filed a timely appeal or had good cause for a late appeal under Section 32a of the Act, in responding to the redetermination of October 27, 2017. A timely appeal was due on or before November 27, 2017.

The claimant did not file his appeal until December 6, 2017. However, his unrebutted testimony shows that he did not receive a timely redetermination. Rather, he only learned of the redetermination when he physically went to an Agency office on December 6, 2017 and was at that time made aware of it. He filed his appeal the same day. Therefore, he has established good cause for the late appeal, and he acted within 30 days of being apprised of his appeal rights, and within a year from the date the redetermination was issued.

The next issue is the claimant's separation from the employment. The Agency found the claimant disqualified from receiving benefits under the misconduct provision, and the employer acknowledges that it discharged the claimant under the three days of no call, no show policy. However, the Michigan Employment Security Act has been amended in recent years and contains a more specific provision that covers the separation that occurred here.

Section 29(1)(a) of the Act, the voluntary leaving provision, was included in the notice of hearing as a possible issue for the hearing, and states in part as follows:

> An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.

The evidence shows the claimant was a no call, no show on Wednesday, September 6, 2017, Thursday, September 7, 2017, and Friday, September 8, 2017. The employer did not discharge the claimant until after the three days of no call, no show. The claimant was also a no call, no show on Monday, September 4, 2017. The claimant knew that he could be discharged upon three consecutive days of no call, no show.

The statute appears to me to be written in terms of a "strict-liability." That is, if the terms are met, the disqualification applies.

Although it may have been very difficult, it is possible that the claimant could have acquired enough funds to call the employer each day to avoid the discharge and disqualification, and/or to at least attempt to request a personal leave of absence to give the claimant some time to get his affairs in order. These steps were not taken.

In any case, it appears to me that the facts as found require me to find the claimant disqualified from receiving benefits under the three days no call, no show provision.

The claimant would not be disqualified under the misconduct provision, because the claimant had a reason for being absent from work that was beyond his control. The incarceration provision, Section 29(1)(f) of the Act, was not noticed for hearing, and is not applicable, because the claimant has not yet been sentenced.

IMPORTANT: TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME

This Order will become final unless an interested party takes ONE of the following actions: (1) files a written, signed, request for rehearing/reopening to the Administrative Law Judge, or by an office or agent office of the agency OR (2) files a written, signed, appeal to the Michigan Compensation Appellate Commission at P.O. Box 30475, Lansing, MI 48909-7975 (Facsimile: 517-241-7326); OR (3) files a direct appeal, upon stipulation, to the Circuit Court on or before:

July 2, 2018

I, C. Casale, certify a copy of this order has been sent on the day it was signed, to each of the parties at their respective addresses on record.

(SEE ATTACHED SHEET)

English

IMPORTANT! This document(s) contains important information about your unemployment compensation rights, responsibilities and/or benefits. It is critical that you understand the information in this document.
IMMEDIATELY: If needed, call 1-866-500-0017 for assistance in the translation and understanding of the information in the document(s) you have received.

Arabic

مهم! تحتوي هذه الوثيقة (الوثائق) على معلومات مهمة عن حقوق تعويضات البطالة ومسؤولياتك و / أو فوائدك. من المهم أن تفهم المعلومات الواردة في هذه المستند.
على الفور: إذا لزم الأمر، اتصل على 1-866-500-0017 للمساعدة في ترجمة وفهم المعلومات في الوثيقة (الوثائق) التي تلقيتها.

Spanish

¡IMPORTANTE! Este (s) documento (s) contiene información importante sobre sus derechos, responsabilidades y / o beneficios de compensación por desempleo. Es fundamental que entienda la información de este documento.
INMEDIATAMENTE: Si es necesario, llame al 1-866-500-0017 para obtener ayuda en la traducción y comprensión de la información en el documento (s) que ha recibido.

Mandarin

重要！本文件包含有关您的失业补偿权利，责任和/或利益的重要信息。 了解本文档中的信息至关重要。

立即：如果需要，请致电1-866-500-0017以协助翻译和了解您收到的文件中的信息。

Albanian

E rëndësishme! Ky dokument përmban informacione të rëndësishme për të drejtat, përgjegjësitë dhe / ose përfitimet e papunësisë. Eshtë e rëndësishme të kuptojmë informacionin në këtë dokument.
Menjëherë: Nëse është e nevojshme, telefononi 1-866-500-0017 për të ndihmuar në përkthimin dhe kuptimin e informacionit në dokumentet që keni marrë.

REQUEST FOR REHEARING OR REOPENING BEFORE AN ADMINISTRATIVE LAW JUDGE

When the appeal to the Administrative Law Judge (ALJ) has been dismissed for lack of prosecution or a party is in possession of newly discovered material information not available when the case was heard by the ALJ, the party may request rehearing in writing before the ALJ instead of appealing to the Michigan Compensation Appellate Commission (Commission). A request for rehearing must be signed by the requesting party or their agent and RECEIVED by the Michigan Administrative Hearing System (MAHS) at **25660 W. Eight Mile Road, Southfield, MI 48033** or by an office or agent office of the agency, within 30 calendar days after the date of this decision. The party requesting rehearing must also serve the request on the opposing party. A rehearing request received (as described above) more than 30 days after the decision is mailed, shall be treated as a request for reopening.

The ALJ may, for good cause, reopen and review this decision and issue a new decision or issue a denial of rehearing/reopening.

If a request for rehearing or reopening is not received by MAHS, and an appeal to the Commission is not submitted, the hearing decision becomes final.

If the Agency fails to comply with an ALJ decision or order more than 30 days, but within 1 year, after the date of mailing of the decision, you may request, in writing, that the ALJ reopen the matter. You must serve a copy of the request to reopen on the other party.

APPEAL TO THE MICHIGAN COMPENSATION APPELLATE COMMISSION

The Michigan Compensation Appellate Commission (Commission) consists of up to nine members appointed by the governor and is not part of the Unemployment Insurance Agency (UIA).

An appeal to the Commission shall be in writing and signed by the party or his/her agent and must be RECEIVED directly by the COMMISSION within 30 days after the mailing of the ALJ's hearing decision or order denying rehearing or reopening. Parties may obtain the Commission appeal form by going online and downloading the form located at: **http://www.michigan.gov/documents/lara/UI_Appeal_Form_602012_7.pdf.** A timely appeal may be made by personal service, postal delivery **(P.O. Box 30475, Lansing, MI 48909-7975)**, facsimile transmission **(517-241-7326)**, or other electronic means as prescribed by the Commission.

The timely appeal/request may also seek to present additional evidence in connection with the appeal or request an oral argument before the Commission. The Commission may consider written argument only if all parties are represented; by agreement of the parties; the Commission orders oral argument; or the Commission orders evidence be produced before it. For additional information, please review the Mich Admin Code, Rules 792.11416 - 792.11429 or visit **http://dmbinternet.state.mi.us/DMB/ORRDocs/AdminCode/1742_2017-066LR_AdminCode.pdf.**

An appeal cannot be requested by telephone. More information about the appeal process to MCAC can be found on Page 21 of "A Guide to Unemployment Insurance Appeals Hearing", located at the following link: **http://www.michigan.gov/documents/uia_UC1800_76144_7.pdf.**

BY-PASS OF COMMISSION/DIRECT APPEAL TO THE CIRCUIT COURT

A party may by-pass appealing to the Commission and appeal a decision or final order of an ALJ directly to a circuit court in the county in which the Claimant resides or in the county in which the Claimant's place of employment is (or was) located, or if the Claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, if the parties (Claimant and Employer), or their respective authorized agents/attorneys, sign a timely written stipulation agreeing to the direct appeal to the circuit court. **The stipulation must be mailed to the Michigan Administrative Hearing System, 3026 W. Grand Blvd, 2nd Floor Annex, Suite 2-700, Detroit, Michigan 48202.** Application for review to a circuit court must be made within 30 days after the mailing date decision or final order by any method permissible under the rules and practices of the circuit court. The responsibility for properly and timely filing an appeal with the clerk of the circuit court rests with the party filing the appeal.

APPEAL TO THE

MICHIGAN COMPENSATION APPELLATE COMMISSION

Mail to: P.O. Box 30475
Lansing, MI 48909

Fax to: 517-241-7326

* *

Appealing Party (check one): ☒ Claimant ☐ Employer ☐ UIA

Claimant: Leonard Wilson SS#: 6383 (last 4 digits)

Claimant Address: [redacted] LANSING MI 48906

Employer(s): Meijer Great Lakes Limited Part

Employer Address: _____

Docket No.	18-010160	Case No.	10586964	Decision Date:	June 1, 2018
Docket No.		Case No.		Decision Date:	
Docket No.		Case No.		Decision Date:	

(If appealing multiple Administrative Law Judge Decisions and/or Orders, please list all Docket (Appeal) Nos, Case Nos, & Decision Dates)
(attach additional pages/documents if necessary)

Reason(s) for Appeal:

Disagree with Judge's decision

Date: 6-25-2018 Filing Party: Leonard Wilson
Signature (Required)

Print Name: Leonard Wilson

Your appeal must be received at Michigan Compensation Appellate Commission (MCAC) within 30 days from the Mailed Date of the Administrative Law Judge's (ALJ) Decision or Order. Please mail or fax your appeal to the address or fax number listed at the top of this form. Questions - contact MCAC at 1-800-738-6372.

LARA is an equal opportunity employer/program.

RECEIVED
JUN 29 2018
MICHIGAN COMPENSATION APPELLATE COMMISSION

MCAC-09/20/17

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

In the Matter of

LEONARD A. WILSON, Appeal Docket No.: 18-010160-256982W

Claimant, Social Security No.: [redacted]

MEIJER GREAT LAKES LIMITED,

Employer.

DECISION OF MICHIGAN COMPENSATION APPELLATE COMMISSION

This case is before the Michigan Compensation Appellate Commission (Commission) because of the claimant's timely appeal from a June 1, 2018 Administrative Law Judge (ALJ) decision. The decision reversed a May 9, 2018 Unemployment Insurance Agency adjudication and found the claimant disqualified for benefits under the voluntary leaving provision of the Michigan Employment Security Act (Act)[1] , Section 29(1)(a). After reviewing the record, the Commission finds that the ALJ's decision should be affirmed.

The claimant, Leonard A. Wilson, began working for the involved employer, Meijer Great Lakes Limited, on October 15, 2014. The claimant last performed services for the employer on September 3, 2017. The claimant was absent without notice the following day, September 4, 2017. The claimant was also absent on September 5, 2017. The claimant called the employer on the 5th and informed it that the reason he was absent on the 4th and would not be in that day was because he had been arrested and was in jail. The claimant was then absent without notice on September 6, 7, and 8, 2017.

A claimant who was absent for three days without notice has, as a matter of law, voluntarily left employment. See Section 29(1)(a) of the Act. A claimant is disqualified for benefits if the claimant left work without good cause attributable to the employer. A claimant who left work is presumed to have voluntarily done so without good cause. See Section 29(1)(a) of the Act. Good cause exists when the circumstance which prompted the claimant's leaving would have caused a reasonable, average and otherwise qualified employee to leave. See *Carswell v Share House, Inc.*, 151 Mich App 392 (1986).

The claimant's separation is considered a leaving as he was absent without notice for 3 days. The claimant was absent without notice because he had been arrested and was jailed. The claimant's arrested and incarceration were not attributable to the employer. Consequently, the claimant is disqualified for benefits under Section 29(1)(a) of the Act and the ALJ's decision will be affirmed.

[1] MCL 421.1 *et seq.*

Therefore,

IT IS ORDERED that the ALJ's June 1, 2018 decision is affirmed.

IT IS FURTHER ORDERED that the claimant is disqualified for benefits under the voluntary leaving provision of the Act, Section 29(1)(a).

IT IS FURTHER ORDERED that the Commission retains no jurisdiction in this matter.

Phillip A. Hendges — Commissioner

Kevin L. Weise — Commissioner

Gary Goolsby — Commissioner

MAILED AT LANSING, MICHIGAN SEP 11 2018

This decision shall be final unless EITHER (1) the Michigan Compensation Appellate Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME. OCT 11 2018

English

IMPORTANT! This document(s) contains important information about your unemployment compensation rights, responsibilities and/or benefits. It is critical that you understand the information in this document.
IMMEDIATELY: If needed, call 1-866-500-0017 for assistance in the translation and understanding of the information in the document(s) you have received.

Arabic

مهم! تحتوي هذه الوثيقة (الوثائق) على معلومات مهمة عن حقوق تعويضات البطالة ومسؤولياتك و / أو فوائدك. من المهم أن تفهم المعلومات الواردة في هذا المستند.
على الفور: إذا لزم الأمر، اتصل على 1-866-500-0017 للمساعدة في ترجمة وفهم المعلومات في الوثيقة (الوثائق) التي تلقيتها.

Spanish

¡IMPORTANTE! Este (s) documento (s) contiene información importante sobre sus derechos, responsabilidades y / o beneficios de compensación por desempleo. Es fundamental que entienda la información de este documento.
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Mandarin

重要！本文件包含有关您的失业补偿权利，责任和/或利益的重要信息。 了解本文档中的信息至关重要。

立即：如果需要，请致电1-866-500-0017以协助翻译和了解您收到的文件中的信息。

Albanian

E rëndësishme! Ky dokument përmban informacione të rëndësishme për të drejtat, përgjegjësitë dhe / ose përfitimet e papunësisë. Eshtë e rëndësishme të kuptojmë informacionin në këtë dokument.
Menjëherë: Nëse është e nevojshme, telefononi 1-866-500-0017 për të ndihmuar në përkthimin dhe kuptimin e informacionit në dokumentet që keni marrë.

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

Supreme Court Case No. 163412
Court of Appeals Case No. 349078
Ingham CC No. 18-00071-AE

APPENDIX: VOLUME 2

CLAIMANT-APPELLANT LEONARD WILSON'S SUPPLEMENTAL BRIEF

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IN THE 30TH CIRCUIT COURT

Appeal from the Michigan Compensation Appellate Commission

LEONARD WILSON,
Claimant/Appellant,

File No. 18-711-AE
Hon. James Jamo

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer/Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Agency/Appellee

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CLAIMANT/APPELLANT'S BRIEF

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STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal as of right of the Michigan Compensation Appellant Commission decision regarding Unemployment Compensation Benefits. Under MCL 421.38, decisions of the Michigan Compensation Appellant Commission are appealable by right to the circuit court of the county in which the claimant resides. Mr. Wilson resides in Ingham County.

STATEMENT OF QUESTIONS INVOLVED

1. Under MCL 421.29(1)(a), an employee is ineligible for Unemployment benefits if they have voluntary left their employment without good cause attributable to their employer. An employee who is absent without notice for three or more consecutive days has voluntarily left work. Mr. Wilson had been incarcerated, called during the period of his incarceration and informs his employer of the situation when he was able and then was only able to make collect calls for the remainder of his incarceration. Further, the record before the MCAC contains conflicting testimony regarding Mr. Wilson's schedule and the actual date of his termination. Was there competent, material and substantial evidence to support a finding that Mr. Wilson voluntarily left work after being absent without notice for three consecutive days?

   Michigan Compensation Appellate Commission answered "Yes" to this question.

   Claimant Appellant answers "No" to this question.

STATEMENT OF FACTS

Mr. Leonard Wilson began working for Meijer Great Lakes Limited Partnership, hereinafter Meijer, on October 15, 2014 as a selector. (Record of Proceedings at 19). At the conclusion of his employment he was working as an assistant team member. (Id). According to Mr. Sykes, his direct supervisor, he had a relatively set schedule. (Id). He worked daily starting at 6:45 am and normally had Thursdays off. (Id).

The events that led to Mr. Wilson's termination and are relevant to this Unemployment Benefits Case began on September 4, 2017. On the morning of September 4, 2017 Mr. Wilson was driving in Clinton County and was pulled over by a Clinton County Sheriff Officer. (Id. at 27). During the traffic stop Mr. Wilson was searched and a small amount of a controlled substance was found in his possession. (Id.). Mr. Wilson was incarcerated at the Clinton County Jail. (Id. at 27). He attempted on September 4th to make contact with his employer and was unable to do so because his employer did not accept collect calls. (Id. at 29). He was arraigned the next day on September 5th, 2017 and was given a cash bond that he was unable to post. (Id. at 27). Mr. Wilson then contacted his employer on September 5th, 2017 and informed them that he was not into work on September 4th, 2017 and would not be in on September 5th, 2017 because he was incarcerated. (Id. at 20). Mr. Wilson also testified that he was unable to provide further notice to his employer as they would not take collect calls and he didn't have any money on the jail system to make phone calls with him. (Id. at 29).

The employment records provided by Meijer show that Mr. Wilson no call no showed on September 4th, 2017 and September 5th, 2017. (Id. at 67). They do not show any information for September 6th, September 7th, or September 8th, 2017. (Id.). The notes on the no call/no show's for September 4th, 2017 and September 5th, 2017 show a resolution of Termination. (Id.). Mr. Sykes testified that Mr. Wilson was terminated on September 8th, 2017 and the effective date was September 3rd, 2017 as that was the last day that Mr. Wilson worked. (Id. at 22). The records submitted for review by Meijer do not include a work schedule for the week of September 4th, 2017 showing when Mr. Wilson was actually scheduled to work. (Id. at 43-67).

STANDARD OF REVIEW

The circuit court may reverse an order or decision of the MCAC "only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record." MCL 421.38(1); MCR 7.116(G); Hodge v US Sec Assocs, 497 Mich 189, 859 NW2d 683 (2015).

ARGUMENT

1. THE DECISION OF THE MCAC IS NOT SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD BECAUSE THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT MR. WILSON WAS ABSENT WITHOUT NOTICE FOR THREE CONSECUTIVE DAYS PRIOR TO HIS TERMINATION.

Under MCL 421.29(1)(a), an employee is disqualified from benefits if they voluntarily left work without good cause attributable to their employer. Further, if an

employee is "absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer" Therefore, the issue for consideration by this court is whether the record before the Michigan Compensation Appellate Commission provided competent, material and substantial evidence that Mr. Wilson was absent from his employment for three consecutive days without providing notice to his employer.

A. THE EVIDENCE ON THE RECORD BEFORE THE MICHIGAN COMPENSATION APPELLATE COMPENSATION ACTUALLY SHOWS THAT MR. WILSON'S EMPLOYMENT WAS TERMINATED ON SEPTEMBER 5TH 2017.

Under MCL 421.29(1)(a), an employee is only ineligible for unemployment benefits if they left work voluntarily without good cause attributable to their employer. In order for this statutory section to apply the employee must have actually left work. The MCAC came to the conclusion that Mr. Wilson voluntarily left work because he was absent without notice for three consecutive days. However, the evidence presented to the MCAC in this matter does not provide substantial evidence that Mr. Wilson voluntarily left work. Mr. Sykes, Mr. Wilson's supervisor, testified that Mr. Wilson was terminated on September 8th, 2017, effective September 3rd, 2017, after being a no call/no show for September 6th, 7th, and 8th, 2017. (Id. at 22). However, this testimony is contradicted by evidence provided to the MCAC by Meijer. As part of the evidence Meijer submitted attendance records through mEmployment, Meijer's computerized

personnel records. According to these records, Mr. Wilson is listed as a no call/no show on September 4th, 2017 and September 5th, 2017 and both dates are resolved with termination. (Id. at 67). The records do not include any information for the dates of September 6th, 2017, September 7th, 2017, or September 8th, 2017. (Id.). The lack of information on those dates leads to the reasonable conclusion that as of September 5th, 2017 Meijer no longer considered Mr. Wilson an employee and thus had no need to record whether Mr. Wilson was present for his shift. Therefore, Meijer's own employment records provide direct evidence that the decision to terminate Mr. Wilson was made on September 5th, 2017. This suggests termination occurred three days earlier than Mr. Sykes testified. Further, Meijer did not provide any documentation related to Mr. Wilson's termination showing the effective date of his termination, the reason for his termination, and the date the decision was actually made. (Id. at 43-67).

According to the attendance records kept by Meijer Mr. Wilson was terminated after having missed only two days of work. (Id. at 67). Therefore, regardless of the reason Mr. Wilson was terminated by Meijer in cannot be shown by competent, material and substantial evidence that Mr. Wilson employment was terminated because he voluntarily left work. As such the MCAC was incorrect when it determined that he was ineligible to receive unemployment benefits under MCL 421.29(1)(a).

B. THE EVIDENCE ON THE RECORD BEFORE THE MICHIGAN COMPENSATION APPELLATE COMPENSATION DO NOT SHOW THAT MR. WILSON WAS ABSENT FOR THREE CONSECUTIVE DAYS PRIOR TO HIS EMPLOYMENT.

Even if this court were to find that there was competent, material and substantial evidence to support a finding that Mr. Wilson was not terminated until September 8th, 2017 this court should still reverse the MCAC decision. There is not substantial evidence on the record below to support a finding that Mr. Wilson was scheduled to work on Thursday September 7th, 2017, the second of the three days Mr. Wilson was allegedly absent without notice. Mr. Sykes testimony on his initial direct examination was that Mr. Wilson had pretty close to a set schedule, started at 6:45 am and normally had Thursdays off and had Saturdays off. (Id. at 19). Mr. Wilson took the stand and testified that his schedule for the week of September 4th, 2017 had him working September 4th, 5th, 6th, and 8th and that he was not scheduled to work September 7th. (Id. at 33). Mr. Sykes was then recalled and testified that the schedule he had showed Mr. Wilson was scheduled September 7th. (Id. at 34-35). However, neither Mr. Sykes or Meijer provided a copy of this schedule to the MCAC as part of the record. (Id. at 43-67). Therefore, the record below contains conflicting testimony regarding whether Mr. Wilson was scheduled to work on September 7th, 2017 and does not contain any documentation of the schedule for the week of September 4th, 2017 showing that Mr. Wilson was in fact scheduled to work. Additionally, the attendance records provided by Meijer as part of the record below do not contain any record of Mr. Wilson's attendance on September 7th, 2017. Therefore, the record below lacks substantial evidence to support the finding that Mr. Wilson was absent without notice on September 7th, 2017.

Further, the testimony below agreed that on September 5th, 2017 Mr. Wilson did in fact make a call to Meijer informing them that he was not in on September 4th, 2017 and would not be in on September 5th, 2017 because he was incarcerated. (Id. at 20). Therefore, on September 5th, 2017 Mr. Wilson did provide his employer with notice that he would not be in and was therefore not absent without notice on September 5th, 2017. Meijer never claimed in any of the proceedings below, and neither the Administrative Law Judge or the Michigan Compensation Appellate Commission found the Mr. Wilson was absent without notice on September 5th, 2017. (Id. at 75, 81). Thus, the issue is whether Mr. Wilson was absent without notice on September 6th, 7th and 8th. Because, there is not substantial evidence Mr. Wilson was actually scheduled to work on September 7th, 2017 he was at most absent without notice for three non-consecutive days on September 4th, 2017, September 6th, 2017, September 8th, 2017. As such, the record below lack substantial evidence that Mr. Wilson was absent without notice for three consecutive days and this court should reverse the decision of the MCAC and find that Mr. Wilson is not disqualified for benefits under MCL 421.29(1)(a).

C. THE EVIDENCE PRESENTED TO MCAC WHEN TAKEN AS A WHOLE DOES TO AMOUNT TO SUBSTANTIAL EVIDENCE THAT MR. WILSON VOLUNTARILY LEFT WORK BECAUSE HE DID CALL IN ON SEPTEMBER 5TH AND WAS NOT ABLE TO MAKE PHONE CALLS TO REACH HIS EMPLOYER THE OTHER DAYS HE WAS INCARCERATED

In order for Mr. Wilson to be ineligible for unemployment benefits it must be show that he was absent for three consecutive days without providing notice to his employer in a manner acceptable to them. The uncontroverted testimony on the record

at the hearing before the MCAC was that Mr. Wilson called his employer on September 5th, 2017 and informed them he was not going to be into work on September 5th, 2017 and was not in on September 4th, 2017 because he was incarcerated. (Id. at 20). The fact that after calling in on September 5th, 2017 and informing Meijer he was incarcerated he had no contact with Meijer for the next few days should when taken as a whole put Meijer on reasonable notice that Mr. Wilson was likely still incarcerated.

Regarding the notice in a manner acceptable to Meijer, the sections of the employee handbook provided by Meijer only state how long before a shift various types of employees must give notice that they will not be in. The manual does not state who the notice must be given to nor does it state whether an employee must call in everyday they are going to be absent when the circumstances the caused the employee to be absent are ongoing. (Id. at 50-51). In Mr. Wilson's case the reason for his unemployment was that he was incarcerated on September 4th, 2017 and was unable to make bond until September 17, 2017. (Id. at 28). On September 5th, 2017, Mr. Wilson called Meijer and reached the security office, he informed them he was not in on September 4th, 2017 and would not be in on September 5th, 2017 because he was incarcerated. (Id. at 20). This incarceration remained as blockade to him reporting for work until September 17th, 2017 when he was able to make bond. (Id. at 27-28). If the absent without notice requirement was truly read to require disqualification from benefits under these circumstances, then it would require someone with a ongoing circumstance to call in everyday and inform their employer that the condition still exists in order to retain eligibility for

unemployment benefits. This would pose an unreasonable burden on the employee in order to preserve his benefit eligibility.

Further, MCL 421.29(1)(a) when read as a whole is primarily about disqualifying from benefits an individual who has employment and is able to perform the work from quitting their job and collecting unemployment benefits rather than working. This supports the overarching public policy that Unemployment benefits are meant to act as a safety net for people who are able to work but are unable to secure employment after losing a job from suffering undue financial harm. In the sentence of MCL 421.29(1)(a) immediately proceeding the three day absent without notice provision the statute states that a person who leaves work is presumed to have done so voluntarily. This phrasing suggests that an individual who leaves work could submit evidence to show they did not leave work voluntarily. In this case, Mr. Wilson's failure to call into work everyday following his arrest was not voluntarily. Mr. Wilson was incarcerated and did not have funds with which to make phone calls. Therefore, his only way to contact his employer was to make collect calls which they would not accept. Additionally, Mr. Wilson did obtain a courtesy call on September 5th, 2017 and called his employer to inform them of his situation. When taken as a whole this evidence proves that Mr. Wilson desired to maintain his employment but was unable to do so. Therefore, the record below did not contain substantial evidence that Mr. Wilson voluntarily left work.

CONCLUSION

In conclusion because the record below lacks substantial evidence that Mr. Wilson was absent without notice for three consecutive days the Michigan Compensation Appellate Commission was incorrect in determining that Mr. Wilson voluntary left work which would have made him ineligible for unemployment benefits. Therefore, Mr. Wilson respectfully requests this honorable to reverse the decision of the Michigan Compensation Appellate Commission and find that he is eligible for unemployment benefits and remand the matter for a determination of the amount of benefits.

Respectfully Submitted,

Dated: February 8, 2019

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PROOF OF SERVICE

I certify that on February 8, 2019, I, Scott M. Nichol, having been first duly sworn, state that I personally served a copy of the **CLAIMANT/APPELLANT'S BRIEF**, and PROOF OF SERVICE on the following parties by first class mail in a properly addressed envelope with proper postage affixed to the addresses below:

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Dated: February 8, 2019

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Agency/Appellee Unemployment Insurance Agency's Brief
Ingham County Circuit Court

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

LEONARD WILSON,

Claimant/Appellant,

v

Case No. 18-711-AE

HON. JAMES S. JAMO

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer/Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Agency/Appellee.
_____/

BRIEF OF APPELLEE UNEMPLOYMENT INSURANCE AGENCY

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Dated: March 1, 2019

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COUNTER-STATEMENT OF JURISDICTION

Leonard Wilson appeals the September 11, 2018 decision of the Michigan Compensation Appellate Commission. Wilson established jurisdiction by filing this appeal within 30 days of the Appellate Commission's decision, as required under MCL 421.38 and MCR 7.116(B).

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Michigan law disqualifies an individual from unemployment benefits when they voluntarily leave work without good cause attributable to the employer. An individual is considered to have voluntarily left after three consecutive no call/no show absences. Here, the Michigan Compensation Appellate Commission held that Wilson voluntarily left his position as an assistant team member after three consecutive absences without contacting his employer, and he was therefore disqualified from receiving unemployment benefits. Is the Appellate Commission's decision supported by competent, material, and substantial evidence and in conformity with the law?

   Appellant Wilson's answer: No.

   Appellee Agency's answer: Yes.

   Appellee Meijer Great Lakes's answer: Unknown.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 6, section 28, of Michigan's 1963 Constitution

> 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.

MCL 421.29 Disqualification from benefits.

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> > (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job. However, if any of the following conditions is met, the leaving does not disqualify the individual:

(i) The individual has an established benefit year in effect and during that benefit year leaves unsuitable work within 60 days after the beginning of that work. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(ii) The individual is the spouse of a full-time member of the United States armed forces, and the leaving is due to the military duty reassignment of that member of the United States armed forces to a different geographic location. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(iii) The individual is concurrently working part-time for an employer or employing unit and for another employer or employing unit and voluntarily leaves the part-time work while continuing work with the other employer. The portion of the benefits paid in accordance with this subparagraph that would otherwise be charged to the experience account of the part-time employer that the individual left shall not be charged to the account of that employer, but shall be charged instead to the nonchargeable benefits account.

MCL 421.38(1) Review by circuit court; direct appeal of order or decision of administrative law judge; unemployment agency as party; manner of appeal.

The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing

of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

INTRODUCTION

The Michigan Employment Security Act unambiguously disqualifies those who are absent from work for three consecutive days without appropriately contacting their employer from receiving unemployment benefits. The reasoning being, that once they have missed three days without reaching out to their employer, they have voluntarily abandoned their employment. Here, the record establishes that Leonard Wilson missed three consecutive work days without contacting his employer, Meijer Great Lakes Limited Partnership, because he was incarcerated. Thus, he was appropriately disqualified from unemployment benefits.

An administrative law judge and the Appellate Commission properly concluded that Wilson was disqualified as having voluntarily quit due to his three consecutive no call/no show absences from work. A review of the record will lead this Court to conclude that the Appellate Commission's decision is consistent with law and supported by competent, material, and substantial evidence on the whole record. As such, this Court should affirm the Appellate Commission's decision.

COUNTER-STATEMENT OF LAW, FACTS, AND PROCEEDINGS BELOW

A. Applicable unemployment law

The Michigan Employment Security Act (MES Act) provides that individuals are disqualified from receiving unemployment benefits under certain circumstances. MCL 421.29. Of relevance here, the MES Act disqualifies an individual who voluntarily leaves work without good cause attributable to their employer. MCL 421.29(1)(a). Where a person is absent for three or more consecutive work days without contacting the employer, they are considered to have left voluntarily without good cause attributable to the employer. *Id.*

B. Nature of the dispute.

Leonard Wilson began working for Meijer in October of 2014. (R 19.)[1] He was originally hired as a selector, and eventually worked as an assistant team member. (R 19.) Wilson worked a generally set schedule, with his shifts beginning at 6:45 a.m. and Saturdays and Thursdays as his usual days off. (R 19-20.)

According to Wilson's supervisor, Todd Wykes, during the week at issue Wilson was scheduled to work six days in a row, beginning Sunday, September 3, 2017, with his next day off being Saturday, September 9, 2017. (R 34-35.) Wykes testified that while Wilson often had Thursdays off, he was scheduled to work Thursday, September 7, 2017. (R 34.) Wilson was absent September 4, 2017 without calling in. (R 20). According to Wykes, he was absent again the next day,

[1] "R" citations refer to the Certified Record of Proceedings filed with this Court on November 20, 2018, by the Michigan Compensation Appellate Commission.

but this time he called Meijer's guard shack with an excuse. (R 20.) He continued to be absent on September 6, 2017; September 7, 2017; and September 8, 2017, but made no further effort to call his employer. (R 20, 22.) Noting Wilson's absence and failure to contact them, Wykes called Wilson twice, but received no response. (R 21.) Wilson's employment was ultimately separated due to his having three consecutive no-call/no-show absences. (R 21.) His effective termination date was noted as September 3, 2017, his last day worked. (R 22.)

Wilson was absent during the week at issue because he had been arrested on September 4, 2017 for possession of a controlled substance, and he remained in jail until he was able to post bond on September 17, 2017. (R 26, 27-28.) Wilson acknowledged his only call to Meijer during his incarceration was the phone call to the guard shack on the afternoon of September 5, 2017. (R 25.) He indicated he called there because he was unable to reach his supervisor on the phone, and that he left a message saying he was not able to make it to work that day due to "unusual circumstances." (R 25.) Wykes did not recall Wilson ever reporting that he was in jail. (R 35.) Wilson did not make further contact with his employer because he could only make collect calls, which Meijer would not accept. (R 29.) Wilson was aware the Meijer had a policy allowing it to end his employment after he failed to appear for three consecutive shifts, and when he finally got out of jail he assumed he no longer had a job due to his absences. (R 21, 30.)

1. The Agency determines that Wilson is disqualified from receiving benefits.

On October 2, 2017, the Agency issued a determination finding Wilson disqualified for unemployment benefits because his excessive attendance issues constituted misconduct. (R 71.) Wilson protested, and in a redetermination dated October 27, 2017, the Agency affirmed its decision that he was disqualified for engaging in misconduct related to his attendance. (R 69.)

Wilson filed a late protest to the redetermination, which was denied as untimely. (R 68.)

2. The Administrative Law Judge Modifies the Agency's decision.

Wilson and Meijer appeared before administrative law judge Douglas Wahl on May 31, 2018. (R 1-38.) Based on the testimony presented, ALJ Wahl found Wilson had good cause for his late protest to the October 27, 2017 redetermination because he did not receive it. (R 75-76.) On the merits, ALJ Wahl reasoned that Wilson's numerous absences fit better within the voluntary quit provision of the MES Act, § 29(1)(a), rather than as misconduct, because that section disqualified individuals from benefits after three consecutive absences without contacting the employer in a manner acceptable to them. (R 76.) He ultimately concluded that Wilson was properly disqualified under § 29(1)(a) because the evidence showed he had three consecutive no call/no show absences on September 6, 2017; September 7, 2017; and September 8, 2017. (R 76.)

3. The Appellate Commission affirms the Administrative Law Judge's decision.

Wilson appealed the ALJ's decision to the Appellate Commission, which unanimously affirmed the ALJ. (R 81-83.) Specifically, the Appellate Commission found that Wilson's separation was considered a voluntary leaving "as he was absent without notice for 3 days" and his absence due to his incarceration was not attributable to the employer. (R 81.)

In this brief, the Agency contends that the Appellate Commission's decision is consistent with law and sufficiently supported by the record. The record evidence is clear that Wilson was absent for three consecutive days without contacting his employer. As such, he was properly disqualified under § 29(1)(a) of the MES Act. For this reason, the Agency asks this Court to affirm the Appellate Commission's decision.

STANDARD OF REVIEW

The Constitution sets forth the parameters within which courts should review administrative decisions. Courts must determine whether the decisions are authorized by law and, where a hearing is required, whether those decisions are supported by competent, material, and substantial evidence. Const 1963, art 6, § 28, ¶ 1. In conformity with this provision, the MES Act provides that a circuit court's review is limited to those questions of fact and law made on the record before the administrative law judge and the Appellate Commission and involved in the Commission's final decision. MCL 421.38(1). A court may reverse a final Appellate Commission decision if it is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." *Id.*

Judicial review of the Appellate Commission's fact-finding is not de novo, but is limited to determining whether the final decision is supported by competent, material, and substantial evidence on the whole record. *McArthur v Borman's Inc*, 200 Mich App 686, 689 (1993). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a mere scintilla but less than a preponderance. *Trumble's Rent-L-Center, Inc v Employment Sec Comm*, 197 Mich App 229, 233 (1992). Thus, a reviewing court is not at liberty to substitute its own judgment for an Appellate Commission's decision that is supported with substantial evidence. *Smith v Employment Sec Comm*, 410 Mich 231, 256 (1981).

Finally, administrative findings of fact based on the credibility of witnesses and weight of the evidence are left undisturbed on appeal. Indeed, when the

Appellate Commission makes such findings of fact, a reviewing court must "accept the findings of fact of the appeal board where there is evidence in the record to support them." *Linski v Employment Sec Comm*, 358 Mich 239, 241 (1959). A reviewing court should not invade the fact-finding province of an administrative body by displacing its choice between two reasonably differing views of the evidence. *Goolsby v City of Detroit*, 211 Mich App 214, 220 (1995) (citations omitted). Stated another way, reviewing courts are precluded from reweighing or examining evidence to determine whether the Appellate Commission's decision is objectively correct. Rather, the test for the reviewing court is whether any state of facts, either known or reasonably assumed, supports the Appellate Commission's judgment. *City of Detroit v Qualls*, 434 Mich 340, 366 (1990), citing *Shavers v Atty Gen*, 402 Mich 554, 612-614 (1978). If the Appellate Commission, within reason, could make the decision that it did, the court must uphold and affirm the decision, even if the court might have reached a different conclusion had it been sitting as the Appellate Commission. *Black v Dep't of Soc Servs*, 195 Mich App 27, 30 (1992); *Knowles v Civil Serv Comm*, 126 Mich App 112, 117-118 (1983).

ARGUMENT

I. The Appellate Commission's conclusion that Wilson is disqualified from receiving benefits due to voluntarily leaving his job is consistent with law and supported by sufficient record evidence.

In this case, both the law and the record evidence support the Appellate Commission's decision that Wilson was properly disqualified from benefits because

his three consecutive absences constituted his having voluntarily abandoned his job. This court should affirm the Appellate Commission's decision.

A. Individuals who have three consecutive absences without contacting their employer are considered to have voluntarily left their job and are disqualified from benefits.

An individual is disqualified from receiving benefits if he leaves work voluntarily without good cause attributable to his employer. MCL 421.29(1)(a). The MES Act considers an individual who is absent from work for at least three consecutive work days without contacting the employer to have voluntarily left work without good cause attributable to the employer. *Id.* The method of contacting the employer in this context must be acceptable to the employer to be considered sufficient. *Id.* Finally, the burden is on the individual seeking benefits to prove that they left work involuntarily, or that the voluntary leaving was for good cause attributable to the employer. *Id.*

B. Wilson's employment ended when he failed to report to work or contact his employer for three consecutive days.

The record below establishes that Wilson was scheduled to work each day between September 3, 2017 and September 8, 2017. (R 34-35.) He was arrested on September 4, 2017 and remained in jail until September 17, 2017. (R 26, 27-28.) As a result of his incarceration, Wilson missed his scheduled work shifts on September 4 through September 8, 2017. (R 20, 22.) It is undisputed that he did not call to report his absences on September 4, 6, 7, and 8, 2017. (R 20, 22, 29). In his testimony, Wilson conceded this fact and explained his employer would not accept

collect calls. (R 29.) There is substantial evidence demonstrating that Wilson was absent three consecutive days, September 6, 7, and 8, without appropriately contacting his employer. Under these circumstances, he is considered to have voluntarily left his employment and is disqualified from unemployment benefits. MCL 421.29(1)(a). The Appellate Commission's conclusion that he was disqualified as having voluntarily left his job is consistent with both the law and the substantial record evidence. It therefore should be affirmed by this Court.

C. Wilson's arguments that he did not have three consecutive no call/no show absences are not persuasive.

In his brief, Wilson presents a series of arguments for why he believes the evidence does not support that he was absent for three consecutive days as contemplated in § 29(1)(a). These arguments are not persuasive, and do not lead to the conclusion that the Appellate Commission decision was not appropriately supported.

1. There is no substantial evidence showing Wilson's employment was terminated before September 8, 2017.

First, Wilson argues that Meijer's employment records indicate he was not terminated on September 8, 2017 as his supervisor testified to, but rather he was terminated on September 5, 2017. (Wilson Br, pp 3-4.) His argument is that he could not have possibly been absent between September 6 and September 8 because his employment had been terminated before that point. (*Id.* at p 4.) In making this argument, Wilson references a series of proposed exhibits Meijer sent to the ALJ in

advance of the hearing.[2] (R 46-67.) These documents were never discussed or admitted into the record as evidence during the course of Wilson's hearing. (R 1-38.) Additionally, without testimony as to the documents' foundation, completeness, contents, and meaning, it is impossible to give them any substantial weight.

Wilson's argument also overlooks that his supervisor, Todd Wykes, gave credible testimony that he was employed through September 8, 2017, and that he did in fact have three no call/no show absences on September 6th, 7th, and 8th. (R 20-22.) Even if there is some evidence showing a different separation date, Wykes's testimony provides more than a mere scintilla of evidence supporting that Wilson was in fact absent three consecutive days between September 6, 2017, and September 8, 2017. Because there is substantial evidence demonstrating three consecutive absences with no contact, the Appellate Commission's decision should be affirmed.

2. There is substantial evidence supporting Wilson missed his shift on Thursday, September 7, 2017.

Wilson also challenges the conclusion that he missed his shift on Thursday, September 7, 2017. (Wilson Br, p 5.) His argument is that there is insufficient evidence he was scheduled to work that day because he testified that he typically had Thursdays off, and his actual work schedule was not admitted as an exhibit. (R

[2] Wilson indicates that these documents were sent to the Appellate Commission. (Wilson Br, p. 3.) However, the cover letter for these documents indicates they were actually submitted to the ALJ eight days before the hearing as "proposed exhibits." (R 46.)

5.) But, again, Wilson disregards Wykes's credible testimony that, while Wilson usually had Thursday off, he was in fact scheduled to work on September 7, 2017. (R 34, 20, 22, 34.) While there may be conflicting testimony on this point between Wilson and Wykes, there is more than a mere scintilla of evidence that he was in fact scheduled to work that day, and this court must accept the factual findings made below. See *Linski*, 358 Mich at 241.

3. Wilson's call on September 5, 2017 was insufficient to inform Meijer of his continued absence.

Wilson finally argues that his call to his employer on September 5, 2017, should have been sufficient to provide notice of his continued absence. (Wilson Br, pp 6-7.) However, this argument has two major flaws: (1) it assumes, inaccurately, that Wilson informed his employer of the true reason for his absence; and (2) notice was not provided in the manner considered appropriate by the employer. Wilson bases this whole argument on the claim that he told his employer that he was in jail when he called on September 5, 2017, and that the employer should have reasonably assumed when he continued to be absent the next few days that he was likely still incarcerated. (Wilson Br, p 7.) However, Wilson's testimony does not support that he actually told his employer why he was absent. Specifically, his testimony was that he reported he was not able to make it to work that day due to "unusual circumstances." (R 25.) Wilson's supervisor, Wykes, did not recall Wilson reporting that he was in jail. (R 35.) Thus, the record does not support that Meijer

knew Wilson was in jail, and his supervisors could not have made assumptions about his continued absence based on this fact.

Moreover, Meijer's policies require team members like Wilson to call in at least sixty minutes before their shift starts to "notify their leadership of an absence." (R 50-51.) The record is clear that on September 5, 2017, Wilson called in the afternoon, several hours after his usual 6:45 a.m. shift start time. (R 19, 25.) The testimony also shows Wilson called the guard shack and left a message; there is no evidence in the record demonstrating he connected with Wykes or anyone else in a leadership position. (R 20, 25.) Even if his September 5, 2017 phone call was informative notice of his continued absence, it was not made in a manner acceptable to his employer as required by § 29(1)(a).

CONCLUSION AND RELIEF REQUESTED

There is substantial evidence to support that Wilson was absent without appropriately contacting his employer for three consecutive scheduled work days. Under these circumstances, he is legally considered to have voluntarily left his job without good cause attributable to his employer. Wilson makes several arguments that are not supported by the record evidence and are not consistent with the MES Act. The Appellate Commission's decision disqualifying Wilson from unemployment benefits is consistent with law and supported by competent, material, and substantial evidence. Therefore, this court should affirm the Appellate Commission's decision.

Respectfully submitted,

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Dated: March 1, 2019

Opinion and Order
Ingham County Circuit Court

STATE OF MICHIGAN
IN THE THIRTIETH CIRCUIT COURT FOR THE COUNTY OF INGHAM
GENERAL TRIAL DIVISION

LEONARD WILSON,

Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP and MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Appellees.

ORDER AND OPINION AFFIRMING AGENCY DECISION

Case No. 18-711-AE

Hon. James S. Jamo

At a session of said Court held
in the City of Lansing, County of Ingham,
this 12 Day of April, 2019.

PRESIDING: HONORABLE JAMES S. JAMO, Circuit Court Judge

This matter is before the Court on Appellant Leonard Wilson's claim of appeal of the September 11, 2018 final decision of the Michigan Compensation Appellant Commission affirming the Administrative Law Judge's June 1, 2018 decision, finding that Appellant was ineligible for unemployment benefits under the voluntary leave provision of the Michigan Employment Security Act, §29(1)(a). The parties requested oral argument pursuant to MCR 7.114. In accordance with MCR 7.114(A), this Court determines that the briefs and record adequately present the facts and legal arguments, and this Court's deliberation would not be significantly aided by oral argument. Therefore, this Court declines to schedule oral argument and instead proceeds on the briefs and record alone.

This Court, being fully apprised of the premises, **AFFIRMS** the MCAC's final decision and denies Appellant's request for relief.

FACTS AND PROCEDURAL HISTORY

Appellant began working for Meijer in October of 2014, first as a selector and later as an assistant team member. He generally had a routine schedule, usually starting at 6:45 a.m. each day with Thursdays and Saturdays off, though it was subject to change.

On September 4, 2017, Appellant was arrested on a controlled substances charge and incarcerated at the Clinton County Jail. Although he was arraigned on September 5th and given a cash bond, he was unable to post that bond until September 17th. During that period, he missed work each day from September 4th through September 8th, 2017. On September 4th, he attempted to call Meijer to notify someone that he would not be at work, but Meijer refused to take a collect call. On September 5th, he did make contact with the Meijer "guard shack," where he left a message that he would not be in to work due to "unusual circumstances." He did not speak to his supervisor or anyone in a leadership position. When he was released from the Clinton County Jail on September 17th, he understood that he would no longer have a job at Meijer. Appellant's employment had in fact been terminated effective September 3rd, 2017, which was the last day he appeared for his shift at work. As a result, Appellant applied for unemployment benefits.

On October 2, 2017, the Unemployment Insurance Agency issued a determination that Appellant was ineligible for unemployment benefits because his absences the week of September 4th constituted misconduct. Appellant appealed, and the ALJ ultimately upheld the Agency's determination with a modification—that Appellant was ineligible for benefits, not due to misconduct, but instead due to the voluntary quit provision of the Michigan Employment Security Act, §29(1)(a), because he had three consecutive absences without notice during the week of

September 4th, 2017. Appellant appealed again, and the Michigan Compensation Appellate Commission affirmed the ALJ's ruling. This appeal followed.

STANDARD OF REVIEW

Article VI, Section 28 of the Michigan Constitution provides:

> 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.

This Court's review is therefore limited by the Constitution as well as the Michigan Employment Security Act to whether the Commission's final decision was authorized by law or whether it was supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1). Substantial evidence is "the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 186-87; 682 NW2d 100 (2004). Finally, a reviewing court is not intended to re-examine and re-weigh the evidence to determine whether the decision was objectively correct; is it intended only to determine whether the final decision was lawful and supported by the evidence, even if the court might have reached a different conclusion had it been sitting as the agency below. *Black v Dep't of Social Services,* 195 Mich App 27 (1992).

ANALYSIS

The Michigan Employment Security Act provides that an individual "who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer" is considered to have voluntarily left work without good cause

attributable to the employer. MCL 421.29(1)(a). The individual claiming benefits carries the burden of proof to show that they did in fact leave work involuntarily or for good cause attributable to the employer. *Id.*

Appellant argues that the decision of the Commission was not supported by competent, material, and substantial evidence on the whole record where the record failed to establish that Appellant was absent for three consecutive days constituting voluntary leave under §29(1)(a). First, Appellant argues that the record evidence shows that Appellant was actually terminated on September 5, 2017, because the attendance records list Appellant as a "no call/no show" for the dates of September 4th and September 5th, but make no notations for September 6th, 7th, or 8th. Appellant argues that these records are reasonably interpreted to mean that Appellant was actually terminated on September 5th, which was the day he had left a message with the Meijer guard shack that he would be absent due to "unusual circumstances." However, Appellee notes that the attendance record documents "were never discussed or entered into the record as evidence during the course of Wilson's hearing."[1] This Court's jurisdiction is limited in scope to the "questions of fact and law on the record made before the administrative law judge and the Michigan appellate compensation commission." MCL 421.38. This Court cannot expand the record to review or rely upon documents not reviewed by the ALJ or the Commission.

Even if this Court were to take the attendance records into account, however, Appellant's supervisor testified before the ALJ that Appellant was not terminated until September 8th. This Court's position is not to determine *which* evidence is the most objectively correct; it is only to determine whether the evidence relied upon by the Commission in its final decision was substantial, competent, and material. This Court finds that the supervisor's testimony does

[1] Appellee's Brief in Support, pg. 10.

constitute substantial, competent, and material evidence on the record to establish that Appellant's employment was not terminated until September 8th.

Similarly, Appellant argues that there is not competent, material, and substantial evidence on the whole record to show that he was absent for three consecutive days without notice because there was not substantial evidence to establish that Appellant was scheduled to work on Thursday, September 7th. This Court disagrees. Again, Appellant's supervisor testified that although Appellant typically worked a schedule with Thursdays off, his schedule was subject to change, and on the week in question, he was scheduled to work on Thursday. Again, this Court finds that the supervisor's testimony does constitute substantial, competent, and material evidence on the record to establish that Appellant was scheduled to work on September 7th, for which Appellant was absent.

Finally, Appellant argues that there is not enough competent, material, and substantial evidence on the whole record to establish that he left work voluntarily because he did call in on September 5th and notify his employer of his absence, and he was unable to call in on the other days he was incarcerated. The evidence on the record showed that Appellant called in to the Meijer guard shack and left a message stating that he would not be in due to unusual circumstances on September 5th. Appellant also testified that he was not able to reach his supervisor because Meijer does not accept collect calls, and Appellant did not have the funds to make a general call; he was able to reach the Meijer guard shack on September 5th only because he was given a courtesy call. That same day, Appellant testified that he did attempt to call his supervisor, but his supervisor didn't answer. MCL 421.29(1)(a) requires that notice of absences must be given by contacting an employer "in a manner acceptable to the employer." Appellee notes that Meijer's policy requires an employee to call in at least sixty minutes before the start of their scheduled shift to "notify their

leadership of an absence." [2] It is undisputed that Appellant did not speak directly to his leadership, or that, although he tried to reach his supervisor, he did not leave a message with his supervisor directly. It is undisputed that Meijer does not accept collect calls. It is undisputed that Appellant did not, on September 5th, notify any employee of Meijer that he would be absent because he was incarcerated, or that his absence would be on-going for any period of time. Appellant testified that he had spoken to a guard shack employee in the afternoon of September 5th, well after his shift was supposed to have begun, and asked that employee to pass on the message that he would be absent due to "unusual circumstances."[3] Appellant's supervisor testified that he did not recall having ever been informed that Appellant was incarcerated. This Court therefore finds there is competent, material, and substantial evidence on the whole record to conclude that Appellant did not contact his employer "in a manner acceptable to his employer" regarding September 4th or 5th, and that Appellant did not provide any notice of his continued absence over September 6th, 7th, or 8th.

This Court must therefore affirm the findings of the ALJ and the final decision of the Commission.

IT IS SO ORDERED.

Pursuant to MCR 2.602(A)(3), this Order resolves the last pending claims and closes the case.

Hon. James S. Jamo (P36650)
30th Circuit Court Judge

[2] Appellee's Brief, pg. 12, citing to the Certified Record, pgs. 50-51.
[3] Record at 25.

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on April 12, 2019

Kacie Smith (P78903)
Law Clerk to the Hon. James S. Jamo

Order Denying Motion for Reconsideration
Ingham County Circuit Court

STATE OF MICHIGAN
IN THE THIRTIETH CIRCUIT COURT FOR THE COUNTY OF INGHAM
GENERAL TRIAL DIVISION

LEONARD WILSON,

Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP and MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Appellees.

ORDER DENYING MOTION FOR RECONSIDERATION

Case No. 18-711-AE

Hon. James S. Jamo

At a session of said Court held
in the City of Lansing, County of Ingham,
this 6 Day of May, 2019.

PRESIDING: HONORABLE JAMES S. JAMO, Circuit Court Judge

This matter comes before the Court on Appellant's Motion for Reconsideration of this Court's April 12, 2019 Opinion & Order. This Court, being fully apprised of the premises, DENIES Appellant's Motion.

A court's decision to grant a motion for reconsideration is an exercise of discretion. MCR 2.119(F)(3); Kokx v Bylenga, 241 Mich App 655, 658; 617 NW2d 368 (2000). A motion for reconsideration is only granted when the moving party demonstrates palpable error that misleads the court and the parties, and that a different disposition of the case would result but for the error. MCR 2.119(F)(3). Generally, a motion for reconsideration will not be granted if the motion "merely presents the same issues ruled on by the court, either expressly or by reasonable implication." Id.

Appellant continues to assert that he was not scheduled to work on one of the dates in question, September 7, 2017. This Court has already ruled there was substantial, material, and competent evidence to support the Appellee's assertion that Appellant was scheduled to work September 7, 2017. This Court therefore finds that Petitioner's motion for reconsideration merely presents the same issues previously ruled upon by this Court.

IT IS THEREFORE ORDERED that Petitioner's Motion for Reconsideration is DENIED.

Hon. James S. Jamo (P36650)
30th Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Lansing, Michigan, on May 7, 2019

Kacie Smith (P78903)
Law Clerk to the Hon. James S. Jamo

State of Michigan

In the Family Division for the 30th Judicial Circuit Court

County of Ingham

Leonard Wilson
Plaintiff/Appellant

vs. Meijer Great Lakes Partnership and Michigan Unemployment Insurance Agency
Defendant/Apellees

CASE NO. 18-711-AE

HON. James S. Jamo

Title

(Attach additional pages if necessary)

Date: 5/3/2019

Leonard Wilson
Signature of Party, Plaintiff/Defendant

CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this _____ to the opposing party by ordinary first class mail addressed to their last known address.

Date: _____

Signature

Motion to reconsideration because the judge reversed the determination of being terminated to involuntary quitting.

The date of termination is in question , was not scheduled to work on September 7th ,2017 therefore the three days of no-call no-show

Claimant/Appellant Leonard Wilson's Brief on Application for Leave to Appeal, May 29, 2019 Michigan Court of Appeals

Approved, Michigan Court of Appeals

LOWER COURT	Electronically Filed	CASE NO.
Ingham County Circuit Court	BRIEF COVER PAGE	Lower Court: 18-000711-AE Court of Appeals:

(Short title of case)

Case Name: **Wilson v Meijer Great Lakes LP and Michigan Unemployment Insurance Agency**

1. Brief Type (select one): ☑ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY ☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Leonard Wilson**

3. ☐ This brief is in response to a brief filed on _____ by _____.

4. ORAL ARGUMENT: ☑ REQUESTED ☐ NOT REQUESTED

5. ☑ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(1) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☑ Table of Contents [MCR 7.212(C)(2)]
- ☑ Index of Authorities [MCR 7.212(C)(3)]
- ☑ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☑ Statement of Questions [MCR 7.212(C)(5)]
- ☑ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)
- ☑ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☑ Relief Requested [MCR 7.212(C)(9)]
- ☑ Signature [MCR 7.212(C)(9)]
- ☑ A separately filed appendix [MCR 7.212(C)(10) and MCR 7.212(J)]

7. This brief is signed by [type name]: /s/ **Rachael Kohl**

Signing Attorney's Bar No. [if any]: **P78930**

IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Court of Appeals Case No. _____

Circuit Court Case No.18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Dated: May 28, 2019

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STATEMENT OF JURISDICTION

On April 12, 2019, the Ingham County Circuit Court issued an order affirming the agency decision that Mr. Wilson was disqualified from unemployment insurance benefits under section 29 of the Michigan Employment Security Act. (Appendix 3). Mr. Wilson timely filed a motion for reconsideration on May 3, 2019. (Appendix 4). On May 6, 2019, the Ingham County Circuit Court issued an order denying Mr. Wilson's Motion for Reconsideration and affirming its own April 12, 2019 Order and Opinion Affirming Agency Decision. (Appendix 4).

Mr. Wilson now seeks leave to appeal the Circuit Court's April 12, 2019 decision to affirm the Agency decision. Mr. Wilson files this application for leave within 21 days of entry of the Circuit Court's order. MCR 1.108(1); MCR 7.203(B)(2); MCR 7.205(A)(1). Therefore, this Court has jurisdiction under MCR 7.203(B)(2).

STATEMENT OF QUESTIONS PRESENTED

I. The Michigan Supreme Court and the Court of Appeals agree that the Michigan Employment Security Act ("MESA" or "the Act"), as "a remedial act," should be liberally construed in favor of providing benefits and "disqualification provisions ... are to be narrowly construed."[1] The lower courts in this case decided that MCL 421.29(1)(a), a disqualification provision regarding voluntary leaving, should be liberally construed against Claimant Leonard Wilson to deny him unemployment compensation. Were the lower courts' decisions contrary to law?

Claimant-Appellant Leonard Wilson Answers:	Yes
Appellee Unemployment Insurance Agency Answers:	Presumed No
Employer-Appellee Meijer Great Lakes Answers:	Presumed No

[1] *See, e.g., Tomei v General Motors Corp*, 194 Mich App 180, 183-4; 486 NW2d 100 (1992); *Empire Iron Mine P'ship v Orhanen* 455 Mich 410, 417; 565 NW2d 844 (1997); *Park v Appeal Bd of Mich Emp Sec Comm'n,* 355 Mich 103, 123; 94 NW2d 407 (1959) (holding that the Act should be interpreted "so as to effectuate that remedial purpose implicit in [the statute's] enactment"). This involves interpreting its provisions so as to "[result] in the allowance of the claims rather than their denial." *Empire Iron Mine P'ship,* 455 Mich at 417 (internal citation omitted).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Leonard Wilson worked for Meijer Great Lakes from October 2014 until September 3, 2017. On September 4, 2017, Mr. Wilson was arrested and unable to make bond. R 27. He remained in jail for two weeks until his friends could help him post bond. R 28, 30.

While incarcerated, Mr. Wilson could only make collect calls. R 29. But his supervisor, Mr. Todd Wykes, did not accept collect calls. R 29. On September 5, Mr. Wilson tried to call his supervisor. R 25. When Mr. Wykes did not respond, Mr. Wilson called the guard shack to leave a message explaining that he was unable to come to work due to his incarceration. R 25. Mr. Wilson spoke with his supervisor later that day when the jail allowed him a courtesy call. R 30.

Mr. Wilson tried to obtain funds from family and friends to place subsequent calls to his supervisor, but he was discharged from Meijer Great Lakes before receiving any funds. R 29. As soon as Mr. Wilson was released from jail, he called his supervisor to confirm what he feared – that he had been discharged for violating the attendance policy. R 21, 26.

Although Meijer Great Lakes discharged Mr. Wilson for failure to comply with their attendance policy, Administrative Law Judge (ALJ) Wahl found that, though Mr. Wilson's absences were due to circumstance beyond his control, he was disqualified under the voluntary leaving provision's no call, no show clause. R 72. Mr. Wilson timely appealed. R 80.

The Michigan Compensation Appellate Commission (MCAC) affirmed the ALJ decision. R 82. The Ingham County Circuit Court issued an order affirming the agency decision that Mr. Wilson was disqualified from unemployment insurance benefits. Mr. Wilson timely filed a motion for reconsideration. The Ingham County Circuit Court issued an order denying the motion and affirming its own order and opinion. Mr. Wilson now seeks leave to appeal the Circuit Court's April 12, 2019 decision to affirm the agency decision.

STANDARD OF REVIEW

The Court of Appeals reviews the Circuit Court's legal conclusions *de novo* and factual findings for clear error. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). The central issue in this appeal is whether MCL 421.29 is a strict liability statute to be construed narrowly against claimants. This is a matter of statutory interpretation. Questions of statutory interpretation are considered questions of law. *Id.* Therefore, this Court should review the circuit court's application of MCL 421.29 *de novo*.

ARGUMENT

I. THIS IS A CASE OF FIRST IMPRESSION WHICH AFFORDS THIS COURT THE OPPORTUNITY TO ENSURE THAT MESA IS PROPERLY APPLIED AND TO PREVENT ABSURD AND UNJUST RESULTS.

In 2011, the Michigan Legislature amended Section 29 of the Michigan Employment Security Act ("MESA" or "the Act") so that separation would be adjudicated under the voluntary leaving provision when an employee accrues three consecutive absences from work without providing notice in a manner appropriate to the employer ("the no call, no show clause"). 2011 Mi PA 269. Before the amendment, similar such separations were adjudicated under the misconduct provision. *See, e.g.*, *Wickey v Appeal Bd of Michigan Employment Sec Comm'n*, 369 Mich 487, 503-04; 120 NW2d 181 (1963); *Jenkins v Appeal Bd of Michigan Employment Sec Comm'n*, 364 Mich 379, 379; 364 110 NW2d 899 (1961); *Sullivan v Appeal Bd Michigan Employment Sec Comm'n*, 358 Mich 338, 339-40; 100 NW2d 713 (1960); *Thomas v Employment Sec Com*, 356 Mich 665, 669-70; 97 NW2d 784 (1959); *Cooper Range Co v Unemployment Comp Comm'n*, 356 Mich 665; 31 NW2d 692 (1948).

This Court's and the Michigan Supreme Court's precedent and Congressional intent indicate that, under MESA as amended, the no call, no show clause moved the burden from the employer to the claimant to prove whether the leaving was voluntary. This amendment therefore gives rise to a rebuttable presumption of voluntary leaving. However, the ALJ in this case ignored precedent and Congressional intent. The ALJ also ignored the parties' agreement – and his own finding – that Mr. Wilson's absences were not voluntary. The ALJ thus erred by construing the amended voluntary leaving provision as a strict liability provision and finding Mr. Wilson disqualified from receiving unemployment compensation.

A. The Current Case Affords This Court The Opportunity to Ensure That MESA Is Properly Applied in Accordance With Precedent And Congressional Intent.

This is a case of first impression on the 2011 amendment to Section 29 of the Act. On its face, the no call, no show clause is consistent with this Court's and the Michigan Supreme Court's holding that absence from work is not disqualifying, unless the absence was first shown to be voluntary. The amendment merely shifted the burden from employers to claimants to prove the voluntariness of three or more consecutive absences. Though MESA's preamble and this Court's jurisprudence provide clear guidance as to the proper statutory interpretation of the provisions in Section 29, no binding resolution of the correct interpretation of the no call, no show clause exists.

In Mr. Wilson's case, lower bodies disregarded the rebuttable presumption of voluntariness that Section 29(1)(a) supports and instead adhered to a strict liability interpretation, which liberally construes a disqualification provision of the Act *against* claimants like Mr. Wilson. This interpretation will incentivize the administration of unemployment compensation in irrational and unequitable ways in contravention of the Act and Congressional intent. Therefore, the current legislation and case law is insufficient to ensure that the Unemployment Insurance Agency ("the Agency") and ALJ decisions on consecutive involuntary absences are consistent and in keeping with the purpose of the Act.

i. The ALJ's Interpretation of Section 29 Ignores This Court's and the Michigan Supreme Court's Precedent Which Supports A Rebuttable Presumption of Voluntary Separation.

Prior to the 2011 amendment that ALJ Wahl cites to support his strict liability interpretation, the Michigan Supreme Court rejected application of the voluntary leaving provision to cases where an employee is absent from work, finding that such cases are properly analyzed under the misconduct provision. *See, e.g.*, *Wickey*, 369 Mich at 503-04; *Jenkins*, 364

Mich at 379; *Sullivan*, 358 Mich at 339-40; *Thomas*, 356 Mich at 669-70; *Cooper Range Co*, 356 Mich 665. In *Thomas*, for example, the claimant was absent from work after being arrested while driving to work. 356 Mich at 667. The Supreme Court of Michigan held that "[d]oing an act, even though voluntarily, which results, contrary to the doer's hopes, wishes and intent, in his being kept forcibly from work is not the same as voluntarily leaving work." *Id.* at 669. Thomas was found not disqualified from unemployment compensation. *Id.* at 670.

In response to the Supreme Court's holdings relating to incarceration, the Legislature amended MESA, not to broaden "voluntary quit," but to include a provision specifically relating to claimants who are incarcerated as a result of a conviction. *Clarke v North Detroit Gen Hosp*, 437 Mich 280, 285; 470 NW2d 393 (1991) (citing 1967 PA 254). As ALJ Wahl properly noted, that provision is not applicable to Mr. Wilson's case because his detention did not result from a conviction.

The Legislature again amended MESA in 2011 to include a clause specifically relating to claimants who accrue three consecutive absences. MCL 421.29(1)(a) ("An individual who left work is *presumed* to have left work voluntarily . . . . An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer . . . shall be considered to have voluntarily left work . . . .") (emphasis added). With this amendment, the Legislature shifted the burden from employers under the misconduct provision to claimants under the voluntary leaving provision.

Very few cases since 2011 cite the no call, no show clause in section 29(1)(a). None expressly address the standard for reviewing consecutive claimant absences under voluntary leaving. However, this Court's precedent suggests that the amendment did not broaden voluntary

quit, but instead gave rise to a rebuttable presumption of voluntariness under which claimants must establish involuntary reasons when they are a no call, no show for three consecutive days.

In one of the only cases relating to the 2011 amendment, Meijer Great Lakes discharged the claimant after a miscommunication when she requested a leave of absence. *Sheppard v Meijer Great Lakes*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No 300681), p 1 (Appendix 5). Both the claimant and her supervisor believed that the other had submitted the required paperwork. *Id.* Meijer interpreted her mistake as a voluntary departure. *Id.* This Court "specifically declined to create a doctrine of constructive voluntary leaving applicable where . . . the claimant was in fact discharged and the employer failed to sustain the discharge as one for misconduct." *Id.* at 4. This Court vacated the circuit court decisions and remanded for reinstatement of the claimant's unemployment compensation. *Id.* at 6. Because the Circuit Court did not analyze whether the claimant voluntarily left her employment under section 29(1)(a) and there was no evidence that the claimant was absent on any days, this Court did not address the proper standard under voluntary leaving as amended. *Id.* at 5.

It is a fiction that a claimant can both be terminated *and* voluntarily quit. Yet here, the ALJ unlawfully created a doctrine of constructive voluntary leaving where the claimant was in fact discharged and the employer failed to establish misconduct. Because ALJ Wahl explicitly invoked Mr. Wilson's three consecutive absences, the current case affords this Court the opportunity to establish the proper standard under Sections 29(1)(a) and ensure that the provision is consistently and fairly applied by the Agency, ALJs, and circuit courts.

ii. The ALJ's Strict Liability Interpretation of Section 29 Ignores Congressional Intent for MESA to Serve As A Remedial Statute That Provides Unemployment Compensation to Michigan Workers.

ALJ Wahl misconstrued Section 29 of MESA to be a strict liability provision, disqualifying all claimants who miss more than three consecutive days of work without providing notice, whatever the reason. Strict liability runs afoul of legislative intent.

The voluntary leaving provision is not a strict liability provision. Instead, the threshold question is whether the employee voluntarily left work. *Warren v Caro Cmty Hosp*, 457 Mich 361, 365;579 NW2d 343 (1998). "If the employee did not voluntarily leave work, the inquiry ends and [the employee] is entitled to unemployment compensation." *Sheppard* unpub op at p 4 (citing *Caro Cmty Hosp*, 579 NW2d at 345). Here, Mr. Wilson's absences were not voluntary, but were a direct result of his arrest and detention. Therefore, the inquiry should have ended, and he should be entitled to unemployment compensation in line with the remedial purpose of MESA.

Statutes should be interpreted to reflect the intent of the legislature. MESA's preamble declares that "[i]nvoluntary unemployment . . . 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 or her family, to the detriment of the welfare of the people of this state." MCL 421.2. The Act evinces an interest in giving unemployment benefits to "those who are unemployed because of forces beyond their control." *Tomei*, 194 Mich App at 183.

Michigan Courts have emphasized time and again that as a remedial act, MESA is to be "liberally construed" in favor of providing benefits and "disqualification provisions . . . are to be narrowly construed." *See, e.g., Tomei*, 194 Mich App at 183-84; *Empire Iron Mine P'ship*, 455 Mich at 417; *Park,* 355 Mich at 123. This involves interpreting its provisions so as to "[result] in the allowance of the claims rather than their denial." *Empire Iron Mine P'ship,* 455 Mich at 417 (internal citation omitted). Accordingly, courts should narrowly construe sections of the Act

that disqualify claimants and liberally construe sections that provide claimants with benefits. *Tomei*, 194 Mich App at 184.

In contravention of precedent in favor of granting benefits, ALJ Wahl liberally construed the voluntary leaving provision against granting benefits and ruled that Section 29(1)(a) was a strict liability provision against claimants who would otherwise not be disqualified for absences beyond their control. To support his finding, ALJ Wahl referenced the 2011 amendment to MESA. 2011 Mi PA 269. Although there is limited legislative history for the amendment to this provision, *see* Mi H Journal, 96th Legislature, Reg Sess 2871–2876 (2011), it is contrary to the purpose of the Act to find that the amendment enacted a strict liability provision.

In *Tomei*, the employer gave the claimant a Hobson's choice: either stay at his current plant until it closed down or transfer to a new plant. *Id.* at 182. When the claimant decided to stay and filed for unemployment insurance after the plant closed, the Agency liberally applied the voluntary quit provisions to disqualify him from benefits. *Id.* at 183. On appeal, this Court construed the voluntary quit provision narrowly to reverse, holding that nothing about his choice was "voluntary," since he "was forced to choose between untenable options in the face of an indeterminate future." *Id.* at 188.

Here, the ALJ's expectations likewise gave Mr. Wilson an untenable choice: either find a way to communicate each day of his detention with his employer, who did not accept collect calls, by raising funds and requesting courtesy calls, break out of jail to go to work, or otherwise accept a discharge that would disqualify him from unemployment compensation. The ALJ's strict liability ruling is a liberal application of MESA against claimants that contravenes Congressional intent. As in *Tomei*, this Court should construe the voluntary quit provision

narrowly to reverse the lower courts' decisions, because nothing about Mr. Wilson's choice was "voluntary" since he did not leave his job voluntarily. The reason he did not go to work was outside of his control.

The current case thus affords this Court the opportunity reaffirm Congressional intent and to ensure that Section 29 is consistently applied by the Agency, ALJs, and circuit courts.

B. The Current Case Affords This Court The Opportunity to Prevent Absurd Results and Punishment of Faultless Claimants That The Strict Liability Interpretation of Section 29 Will Otherwise Yield.

It is not unreasonable for employers to discharge employees who fail to come to work for three consecutive days without providing appropriate notice. However, it is unreasonable to disqualify those claimants from unemployment compensation while they seek new employment when the absences resulted from circumstances beyond the claimants' control. Here, ALJ Wahl applied a strict liability standard, concluding that Mr. Wilson's reason for three consecutive absences, though beyond his control, was categorically irrelevant to disqualification under Section 29. R 76. This application, if not reversed, will necessarily lead to absurd and unjust results.

In 1996, this Court heard a case factually analogous to Mr. Wilson's. *Guebara v Muskegon Aluminum Foundry*, unpublished per curiam decision of the Court of Appeals, issued September 27, 1996 (Docket No. 180648) (Appendix 6). The claimant was arrested and could not post bond. *Id.* at 1. He was subsequently terminated for violating his employment contract after three consecutive absences without notifying his employer. *Id.* at 1-2. This Court remanded the case for the Agency to determine if the claimant's absences and inability to post bond were beyond his control. *Id.* If beyond his control, this Court found that there was no misconduct and he was not disqualified. *Id.* This Court did not address whether Guebara was

disqualified under the voluntary leaving provisions as the case arose before the 2011 amendment. However, it would be illogical to assert that while the inability to post bond was beyond his control, the claimant voluntarily left his employment.

Statutes "should be construed to prevent absurdity, hardship, injustice, or prejudice to the public interest" *Franges v General Motors Corp*, 404 Mich 589, 612; 273 NW2d 829 (1979). Here, the ALJ placed an onerous and unlawful burden on Mr. Wilson by finding the claimant's detention irrelevant to the disqualification analysis under the voluntary leaving provision. ALJ Wahl demanded that, while detained, Mr. Wilson find a way to raise money to call to his employer who would not accept collect calls from the jail. This demand will lead to great hardship for claimants and absurd results.

As a result of ALJ Wahl's strict liability interpretation, countless unemployed claimants will be refused benefits, despite having acted without fault. Claimants such as these are insisting on basic equity; they are also invoking the statutory protections of a remedial Act designed by its drafters to do away with "the disastrous effects of involuntary unemployment." MCL 421.2. Protecting the involuntarily unemployed means protecting those who are unemployed "through no fault of their own" MCL 421.2(1). Claimants who are detained and unable to access funds to make calls or to convince guards to allow them to make courtesy calls at times potentially convenient to an employer cannot seriously be said to be at fault. Yet that is precisely what strict liability assumes. Mr. Wilson did everything he could; it still was not enough for his employer.

The strict liability standard will give employers and the Agency carte blanche to impose whatever conditions and they wish upon absent employees who have no intention to miss work, let alone quit. The Agency may go further than even this case, by automatically disqualifying a claimant who is in a coma after a car accident and therefore is medically incapable of notifying

their employer of the circumstances within three days. Under a strict liability construction of the no call, no show clause, that claimant, even once medically able to work, would still be disqualified from receiving benefits. This is an absurd result from an amendment that sought only to shift the burden of proof in cases of consecutive absences so that, for example, a claimant who took vacation without informing their employer would be disqualified from unemployment compensation. The amendment sought only to disqualify claimants to who *voluntarily* acted to effectuate separation from employment.

ALJ Wahl's narrow analysis supports a reading of MESA that will lead to absurdity and great hardship for claimants in contravention of the Act and this Court's decisions. Under his interpretation, merely because a claimant cannot call their employer, on account of circumstances beyond their control, that claimant is automatically disqualified from unemployment compensation after three consecutive days.

II. THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE THE ADMINISTRATIVE LAW JUDGE INTERPRETED SECTION 29 OF MESA CONTRARY TO MICHIGAN SUPREME COURT PRECEDENT AND THE ACT ITSELF.

This court has already ruled that absences beyond a claimant's control are not disqualifying and yet the lower bodies in this case upheld an ALJ decision to the contrary. Despite finding Mr. Wilson not disqualified from receiving benefits under the misconduct provision, ALJ Wahl nevertheless found Mr. Wilson disqualified. R 72. Despite finding that Mr. Wilson's absences were beyond his control, the ALJ found that the Act *required* that he find Mr. Wilson disqualified under the voluntary leaving provision. R 76. This finding is contrary to precedent and the purpose of the Act.

Discharge is adjudicated under Section 29(1)(b) of MESA. When the separation itself is contested, the employer has the burden of proof to establish the nature of the discharge.

Harrison v Hinman Co, unpublished opinion of the Court of Appeals, issued March 22, 1996 (Docket No. 166274) (Appendix 7). A discharge is disqualifying only if the employer establishes misconduct, which is "limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect." *Carter v Michigan Employment Sec Com*, 364 Mich 538, 541; 111 NW2d 817 (1961).

Tardiness and absences that result in discharge are adjudicated under the misconduct provision. Before the 2011 amendment to Section 29 of MESA, this included consecutive absences in violation of employer policy. This Court held that absences and tardiness do not constitute misconduct if they resulted from reasons beyond the claimant's control. *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984). Absences resulting from detention do not amount to misconduct. *Jones v Hackley Hosp*, unpublished opinion of the Muskegon Circuit Court, issued October 2, 1984 (Docket No. 83-17596 AE), p6 (holding that "[c]ertainly, plaintiff's inability to get to work or to notify his employer because of his incarceration does not constitute willful or wanton misconduct connected with his employment as contemplated by the statute.") (Appendix 8). A similar analysis applies under the amended voluntary leaving provision.

In *Amway Grand,* Ms. Washington was discharged for tardiness and absenteeism. *Id.* at 1. On her final day of work with Amway Grand, the claimant was late because her ex-husband tried to break into her home, necessitating that she call the police. *Id.* at 2. The claimant argued that she had good cause for her tardiness and absenteeism due to reasons beyond her control that could not be considered willful or wanton disregard of the employer's interests. *Id.* at 6. This Court held that "statutory misconduct cannot be made out under the *Carter* definition if the

board factually determines that the absences . . . which resulted in the discharge were with good cause beyond the claimant's control." *Id.* at 8. It was not unreasonable for Washington's employer to terminate her employment after repeated tardiness and absenteeism; but it was unreasonable to disqualify her from unemployment compensation while she sought new employment.

Here, the parties agree Mr. Wilson was discharged for violating Meijer Great Lakes' attendance policy. R 76. Specifically, Mr. Wilson did not show up for work or call with the proper channels to notify his employer of his absences – he was a no call, no show for at least three consecutive days. R 76. But Mr. Wilson's absences were a direct result of his arrest and detention on September 3 and therefore amounted to good cause due to reasons beyond his control. His absences satisfy the *Carter* definition as applied in *Amway Grand*. As such, ALJ Wahl correctly held that Meijer failed to establish misconduct in Mr. Wilson's case. R 72.

But ALJ Wahl ruled contrary to the Act when he found that Mr. Wilson's absences, although beyond his control, constituted a voluntary quit under section 29(1)(a) and found Mr. Wilson disqualified from unemployment compensation. Typically, a termination should not also trigger a voluntary leaving analysis; because it is a fiction that a claimant can both be terminated and voluntarily quit. In light of the no call, no show clause, it was reasonable that ALJ Wahl looked to the voluntary leaving provision. But, his analysis was flawed.

Under the voluntary leaving provision, the threshold question is whether the employee voluntarily left work. *Cmty Hosp*, 457 Mich at 365. Here, Mr. Wilson's absences were not voluntary, but were a direct result of his arrest and detention. Therefore, the inquiry should have ended, and he should be entitled to unemployment compensation.

The 2011 amendment merely clarified that three consecutive days of no call, no show could give rise to a presumption of a voluntary leaving. It is more appropriate to employ a narrow reading of the now effective voluntary leaving provision and interpret "considered" as analogous to "presumed." This reading is consistent with legislative intent and reaffirms the rebuttable presumption of voluntariness under that provision. It prevents the untenable situation in Mr. Wilson's case where a claimant, otherwise not disqualified under misconduct, is disqualified under voluntary leaving despite party agreement that he was terminated due to involuntary absences. Mr. Wilson was not asking for his job back; he was merely asking for unemployment compensation to which he was entitled after three years of employment with Meijer Great Lakes.

This Court should reaffirm that courts must consider the voluntariness of absences by applying an analogous standard to that which controlled under misconduct. The difference now, is that the burden is on the claimant to prove that the absences were involuntary rather than on the employer to prove willful and wanton behavior against their interest. In accordance with its purpose, MESA should be read to disqualify only those claimants whose absences are voluntary.

CONCLUSION AND RELIEF REQUESTED

The Circuit Court and lower bodies should not have relied on Section 29(1)(a) of the Michigan Employment Security Act as a strict liability provision in contravention of this Court's previous decisions and MESA itself. Many claimants will be similarly disadvantaged by the ALJ's unlawful and unreasonable interpretation of the Act.

For the foregoing reasons, Mr. Wilson respectfully requests that this Court enter an Order:

(a) Granting his Application for leave to appeal and allowing this appeal to proceed as an appeal of right; or

(b) Peremptorily reversing the circuit court's order and instead holding that Claimant-appellant is not disqualified for benefits under MCL 421.29; and

(c) Awarding Claimant-Appellant all other relief that this Honorable Court finds to be appropriate under the circumstances.

Respectfully Submitted,

Dated: May 28, 2019

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IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

Court of Appeals Case No. _____

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

Circuit Court Case No.18-000711-AE

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

PROOF OF SERVICE

I state that on May 28, 2019 I served a copy of the Application for Leave to Appeal via USPS on the parties at the following addresses:

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Agency/Appellee Unemployment Insurance Agency's Brief in Opposition, June 18, 2019 Michigan Court of Appeals

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Agency-Appellee.
_____/

Court of Appeals No. 349078

Ingham County Circuit Court
No. 18-000711-AE

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S BRIEF IN OPPOSITION TO WILSON'S APPLICATION FOR LEAVE TO APPEAL

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Dated: June 18, 2019

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COUNTER-STATEMENT OF JURISDICTION

Leonard Wilson seeks leave to appeal the Ingham County Circuit Court's April 12, 2019 order and opinion affirming the Michigan Compensation Appellate Commission's decision, and the court's May 6, 2019 order denying Wilson's motion for reconsideration. This Court has jurisdiction over Wilson's application for leave to appeal because he timely filed it within 21 days[1] of the circuit court's May 6, 2019 order, as required by MCR 7.205(A).

[1] The end of the 21-day appeal period on the Court's May 6, 2019 order fell on the Memorial Day holiday, May 27, 2019. Under MCR 1.108(1), Wilson had until the next business day, May 28, 2019, to file his application.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Michigan law disqualifies an individual from unemployment benefits when they voluntarily leave work without good cause attributable to the employer. The Michigan Compensation Appellate Commission held that Leonard Wilson voluntarily left his job after three consecutive absences without appropriately contacting his employer, and he was therefore disqualified from receiving unemployment benefits. Did the circuit court apply correct legal principles in affirming the Commission's decision?

   Appellant Wilson's answer: No.

   Appellee Agency's answer: Yes.

   Appellee Meijer Great Lakes's answer: Unknown.

   Circuit court's answer: Yes.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 6, section 28, of Michigan's 1963 Constitution

> 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.

MCL 421.29(1)(a) Disqualification from benefits.

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> > (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. *An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer* and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. [Emphasis added.]
>
> * * *

MCL 421.38(1) Review by circuit court; direct appeal of order or decision of administrative law judge; unemployment agency as party; manner of appeal.

> The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may

require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

INTRODUCTION

Not all unemployed workers in Michigan are qualified to receive unemployment benefits. Our law contains several disqualification provisions, and the one at issue in this case is straightforward. If a worker is absent from work for three or more consecutive work days without properly contacting their employer, they are considered to have voluntarily left their employment without good cause attributable to their employer, and they are disqualified from receiving benefits as a matter of law. This "no-call, no-show" provision requires no interpretation.

Here, the record establishes that Leonard Wilson missed more than three consecutive work days without properly contacting his employer. He had been arrested and jailed on charges of possessing a controlled substance and had limited communication options. He contacted his employer once, but he offered no specifics about why he would not be at work that day or about how long he would be away from work. After that, he went a week and a half without contacting his employer.

Each administrative body and the circuit court concluded that Wilson was disqualified from receiving benefits under the plain language of the no-call, no-show provision. Wilson asserts that the application of the no-call, no-show provision in this case runs afoul of legislative intent. Not so. Applying the clear language of the provision honors legislative intent. Because the circuit court applied correct legal principles, this Court should deny Wilson's application for leave to appeal.

COUNTER-STATEMENT OF APPLICABLE LAW, FACTS, AND PROCEEDINGS

A. Applicable unemployment law

The Michigan Employment Security Act (MES Act) disqualifies individuals from receiving unemployment benefits under certain circumstances. MCL 421.29. Of relevance here, the MES Act disqualifies an individual who voluntarily leaves work without good cause attributable to their employer. MCL 421.29(1)(a). Where a person is absent for three or more consecutive workdays without appropriately contacting the employer, they are considered to have left voluntarily without good cause attributable to the employer. *Id.*

B. Nature of the dispute

Leonard Wilson began working for Meijer in October of 2014 as a selector, and later became an assistant team member. (R 19.)[2] Wilson's schedule was generally consistent—his shifts began at 6:45 a.m., and he usually had Thursdays and Saturdays off. (R 19–20.) But Wilson's employment ended in early September 2017 when he failed to report to work for several days and failed to notify Meijer that he would not be reporting to work.

According to Wilson's supervisor, Todd Wykes, Wilson was scheduled to work six days in a row during the week at issue, beginning Sunday, September 3, 2017,

[2] "R" citations refer to the Certified Record of Proceedings filed with the circuit court on or about November 20, 2018, by the Michigan Compensation Appellate Commission. This record is included as Part 9 of the appendix attached to Wilson's brief in support of his application for leave.

with his next day off being Saturday, September 9, 2017. (R 34–35.) Wykes testified that while Wilson often had Thursdays off, he was scheduled to work Thursday, September 7, 2017. (R 34.)

But Wilson was absent September 4, 2017, and he failed to call in. (R 20). According to Wykes, Wilson was absent again the next day, but this time he called Meijer's guard shack to say he would not be in. (*Id.*) Wilson was also absent the next three days, September 6–8, 2017, and did not contact Meijer any of those days. (R 20, 22.) Noting Wilson's absence and failure to contact them, Wykes called Wilson twice, but received no response. (R 21.) Meijer then terminated Wilson's employment because of his multiple no-call, no-show absences. (*Id.*) His effective separation date was noted as September 3, 2017, his last day worked. (R 22.)

As it turned out, Wilson was absent during the week at issue because he had been arrested on September 4, 2017, for possession of a controlled substance, and he remained in jail until he was able to post bond on September 17, 2017. (R 26–28.) Wilson acknowledged his only call to Meijer during his incarceration was the phone call to the guard shack on the afternoon of September 5, 2017. (R 25.) He indicated he called there because he was unable to reach his supervisor on the phone, and that he left a message saying he was not able to make it to work that day due to "unusual circumstances." (*Id.*) Wykes did not recall Wilson ever reporting that he was in jail. (R 35.) Wilson did not make further contact with Meijer because he could make only collect calls, which Meijer would not accept. (R 29.) Wilson was aware that Meijer had a policy allowing it to end his employment after he failed to

appear for three consecutive shifts, and when he finally got out of jail, he assumed he no longer had a job due to his absences. (R 21, 30.)

C. Administrative proceedings

1. The Unemployment Insurance Agency determines that Wilson is disqualified from receiving benefits.

On October 2, 2017, the Agency issued a determination finding Wilson disqualified for unemployment benefits because his excessive attendance issues constituted work-related misconduct. (R 71.) Wilson protested, and in a redetermination dated October 27, 2017, the Agency affirmed its decision. (R 69.)

Wilson filed a late protest of the redetermination, which the Agency denied as untimely. (R 68.) Wilson then appealed and asked for a hearing before an administrative law judge.

2. The Administrative Law Judge affirms that Wilson is disqualified from receiving benefits, but modifies the Agency's basis for the disqualification.

Wilson and Meijer representatives appeared before administrative law judge Douglas Wahl on May 31, 2018. (R 1–38.) Based on the testimony and evidence presented, ALJ Wahl held that Wilson had good cause for his late protest to the October 27, 2017 redetermination because he did not receive it. (R 75–76.) On the merits of Wilson's claim for unemployment benefits, ALJ Wahl affirmed the Agency's conclusion that Wilson was disqualified, but based that conclusion on a different section of the MES Act. The ALJ held that Wilson's numerous absences fit better within the voluntary quit provision of the MES Act (MCL 421.29(1)(a)),

rather than the misconduct provision (MCL 421.29(1)(b)), because it was a more-specific provision that applied to claimants with three consecutive absences without contacting the employer in a manner acceptable to them. (R 76.) He ultimately concluded that Wilson was properly disqualified under § 29(1)(a) because the evidence showed he had three consecutive no-call, no-show absences on September 6 through September 8, 2017. (*Id.*)

3. The Appellate Commission affirms the Administrative Law Judge's decision.

Wilson appealed the ALJ's decision to the Appellate Commission, which unanimously affirmed the ALJ. (R 81–83.) The Appellate Commission held that Wilson's separation was considered a voluntary leaving "as he was absent without notice for 3 days," and his absence due to incarceration was not attributable to the employer. (R 81.)

D. Circuit court proceedings

Without hearing oral arguments, the Ingham County Circuit Court issued an opinion and order affirming the Appellate Commission. (Wilson App'x, Part 3.) The circuit court reasoned that the competent, material and substantial evidence, including Wykes's testimony, supported the finding that Wilson was absent three consecutive days without appropriately contacting his supervisor, and that it must therefore affirm the Appellate Commission's decision disqualifying him from unemployment benefits. (*Id.* pp 5–6.) The court noted Wilson's attempts to contact

Meijer on September 5th, but found that those attempts did not comply with Meijer's policy on call-ins. (*Id.*)

Wilson moved for reconsideration, but the court denied it because it presented issues that the court already ruled on. (Wilson App'x, Part 4.)

STANDARD OF REVIEW

A. This Court reviews circuit court decisions on administrative appeals to determine whether the court applied correct legal principles.

Appellate courts review a lower court's decision on an administrative appeal to determine whether the lower court applied correct legal principles and whether the court grossly misapplied the substantial evidence test to the administrative tribunal's factual findings, which essentially constitutes a clearly erroneous standard of review. *Hodge v US Sec Associates, Inc*, 497 Mich 189, 194 (2015); *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424 (2010). A finding is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Dep't of Human Servs v Mason*, 486 Mich 142, 152 (2010), citing *In re Miller*, 433 Mich 331, 337 (1989).

Legal issues preserved for this Court's review are reviewed de novo. *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702 (2018).

B. A circuit court reviews Appellate Commission decisions to determine whether they are consistent with law and supported by the record.

The Constitution sets forth the parameters within which circuit courts review administrative decisions. Circuit courts must determine whether the decisions are authorized by law and, where a hearing is required, whether those decisions are supported by competent, material, and substantial evidence. Const 1963, art 6, § 28, ¶ 1. In conformity with this provision, the MES Act provides that a circuit court's review is limited to those questions of fact and law made on the record before the administrative law judge and the Appellate Commission and involved in the Commission's final decision. MCL 421.38(1). A circuit court may reverse a final Appellate Commission decision if it is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." *Id.* Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a mere scintilla but less than a preponderance. *Trumble's Rent-L-Center, Inc v Employment Sec Comm*, 197 Mich App 229, 233 (1992).

A reviewing court is not at liberty to substitute its own judgment for an Appellate Commission's decision that is supported with substantial evidence. *Smith v Employment Sec Comm*, 410 Mich 231, 256 (1981). The sole function of the court in reviewing the administrative decision is to determine whether the decision is supported by competent, material, and substantial evidence on the whole record "from which legitimate and supportable inferences were drawn." *Dep't of Comm Health v Risch*, 274 Mich App 365, 375 (2007).

A reviewing court should not invade the fact-finding province of an administrative body by displacing its choice between two reasonably differing views of the evidence. *Goolsby v City of Detroit*, 211 Mich App 214, 220 (1995) (citations omitted). Stated another way, reviewing courts are precluded from reweighing or examining evidence to determine whether the Appellate Commission's decision is objectively correct.

ARGUMENT

I. The circuit court correctly affirmed the Appellate Commission's conclusion that Wilson is disqualified from receiving benefits because he failed to appropriately call in or show up for work.

In this case, both the law and the record evidence support the Appellate Commission's decision that Wilson was properly disqualified from receiving benefits when he failed to report for work or properly call in for three or more consecutive days. The Appellate Commission properly applied that clear law to the facts of the case, and the circuit court correctly applied its standard of review to affirm that decision. There is no basis for disturbing the circuit court's decision.

A. Individuals who have three consecutive absences without properly contacting their employer are considered to have voluntarily left their job and are disqualified from benefits.

An individual is statutorily disqualified from receiving benefits if he "le[aves] work voluntarily without good cause attributable to the employer." MCL 421.29(1)(a). The MES Act states: "An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a

manner acceptable to the employer . . . shall be considered to have voluntarily left work without good cause attributable to the employer." *Id.* Thus, an individual with three or more consecutive no-call, no-show days is disqualified from receiving unemployment benefits.

B. Wilson's employment ended when he failed to report to work or properly contact Meijer for more than three consecutive days.

The record establishes that Wilson was scheduled to work each day between September 3, 2017, and September 8, 2017. (R 34–35.) He was arrested on September 4, 2017, and remained in jail until September 17, 2017. (R 26–28.) As a result of his incarceration, Wilson missed his scheduled work shifts from September 4 through September 8, 2017. (R 20, 22.) It is undisputed that he did not call to report his absences on September 4, 6, 7, and 8, 2017. (R 20, 22, 29). Though he contacted Meijer on September 5, 2017, it was not in a fashion acceptable to Meijer, as required by § 29(1)(a) of the MES Act.

Meijer's policies require team members like Wilson to call in at least sixty minutes before their shift starts to "notify their leadership of an absence." (R 50–51.) Wilson did neither. The record is clear that on September 5th, Wilson called-in in the afternoon, several hours after his usual 6:45 a.m. shift start time. (R 19, 25.) Wilson called Meijer's "guard shack," not his supervisor or anyone else in a leadership position as required. (R 20.) And Wilson merely said that he would not be in that day because of "unusual circumstances." (R 25.) That was the last anyone at Meijer heard from Wilson for a week and a half.

Thus, there is competent, material, and substantial evidence in the record to support the Appellate Commission's conclusion that Wilson failed to report to work without properly contacting Meijer for three or more days. When such failure occurs, the MES Act says that the individual voluntarily left employment without good cause attributable to their employer and therefore the person is disqualified from receiving unemployment benefits. Because the Appellate Commission's decision is supported by the record and is consistent with law, the circuit court applied correct legal principles in affirming the decision. Wilson's arguments in support of reversing the circuit court are simply not supported by the law.

C. Wilson's arguments in favor of reversing the circuit court are unsupported by the law or the record.

Wilson implores this Court to find he is eligible for benefits because he did not voluntarily leave his job because he had no control over the reason he was unable to report to work. But his arguments miss the mark. Wilson's circumstances fall squarely within the no-call, no-show provision of § 29(1)(a), and the unambiguous statutory language requires him to be disqualified from unemployment benefits.

1. The language of § 29(1)(a)'s no-call, no-show provision is clear and does not contain a rebuttable presumption.

Wilson asserts that § 29(1)(a) does not automatically disqualify a person with three or more consecutive no-call, no-shows; but rather establishes a presumption that the person voluntarily left employment and that the person can rebut that

presumption. (App for Lv, pp 4–6.) But this argument misreads the plain text of § 29(1)(a). When interpreting statutes, the Legislature "is presumed to intend the meaning clearly expressed," and courts "must give effect to the plain, ordinary, or generally accepted meaning" of the terms used. *D'Agostini Land Company LLC v Dep't of Treasury*, 322 Mich App 545, 554 (2018).

The statute is clear: § 29(1)(a) states that a person who is absent three consecutive days without appropriate employer contact "*shall be considered* to have voluntarily left work without good cause attributable to the employer." MCL 421.29(1)(a) (emphasis added). There is no qualifier or presumption in this language. Thus, a person with three or more consecutive no-call, no-shows is deemed to have voluntarily left without good cause and is disqualified from benefits. There is no other statutorily supported interpretation of this section.

In making his rebuttable presumption argument, Wilson relies on a different, more general provision of § 29(1)(a). The second sentence in § 29(1)(a) states the general rule—"An individual who left work *is presumed* to have left work voluntarily without good cause attributable to the employer or employing unit." MCL 421.29(1)(a) (emphasis added). In the very next sentence, however, the Legislature addresses the more specific scenario at issue in this case: where a claimant has three or more consecutive no-call, no-shows. There is no language in the applicable sentence about any presumption.

The fact that the Legislature chose to use two separate, independent sentences indicates it intended two separate ideas. Had the Legislature intended to

merely create a rebuttable presumption that those with three or more consecutive no-call, no-shows had voluntarily quit, it could have said that such workers "*are presumed* to have voluntarily left work without good cause." Instead, it chose to use the more rigid phrase "*shall be considered* to have voluntarily left without good cause." That choice of words cannot be ignored.

The majority of the caselaw that Wilson cites in support of his argument is simply inapplicable to this case. These cases concern individuals who missed work for various reasons, including incarceration, but they all predate the 2011 enactment of the applicable no-call, no-show provision in § 29(1)(a). (See App for Lv, pp 3–5, 9 (citing *Wickey v Appeal Bd of Mich Employment Sec Comm's*, 369 Mich 478 (1963); *Jenkins v Appeal Bd of Mich Employment Sec* Comm's, 364 Mich 379 (1961); *Sullivan v Appeal Bd Mich Employment Sec* Comm's, 358 Mich 338 (1960); *Thomas v Employment Sec Comm*, 356 Mich 665 (1959); *Copper Range Co v Mich Unemployment Compensation Comm*, 320 Mich 460 (1948); *Guebara v Muskegon Aluminum Foundry*, unpublished opinion of the Michigan Court of Appeals, decided September 29, 1996 (Docket No 180648).)

Wilson also cites to a more recent panel decision, *Sheppard v Meijer Great Lakes Limited*, unpublished opinion of the Michigan Court of Appeals, decided December 20, 2012 (Docket No 300681) (Wilson App'x, Part 5), in support of his contention that the no-call, no-show provision of § 29(1)(a) requires an analysis as to *why* the individual left his or her job and whether it was voluntary. (App for Lv, pp 6–7.) *Sheppard*, of course, is not binding on this Court because it is an unpublished

decision. MCR 7.215(C)(1). But is also not persuasive because it is distinguishable in a key respect—the Appellate Commission did not analyze the case under the no-call, no-show provision at the heart of this case. (Wilson App'x, Part 5, pp 4–5.) In fact, this Court reversed the circuit court in *Sheppard* because of the lack of analysis of the no-call, no-show provision. (*Id*. p 5.) The *Sheppard* panel also noted the lack of record evidence that the claimant was absent on a work day or that she failed to report to work on a day she was expected to work. (*Id*.) This is not the case here. The record evidence demonstrates that Wilson missed several consecutive days when he was scheduled to work, and the ALJ, the Appellate Commission, and the circuit court properly analyzed the no-call, no-show provision.

In sum, the statutory language in § 29(1)(a) says that individuals who are absent three or more days without proper employer contact are considered to have voluntarily quit without good cause attributable to their employer. Had the Legislature intended this to be a rebuttable presumption like Wilson asserts, it would have said so like it did elsewhere in the section. Thus, Wilson's argument is not supported by the clear language of the MES Act.

2. The Supreme Court recently rejected Wilson's call to apply statutes in a particular ideological way.

Wilson contends that the MES Act is a remedial statute and that the disqualification provisions of § 29(1)(a) should be narrowly construed in favor of finding him eligible for benefits. (App for Lv, pp 6–11.) But our Supreme Court recently held that courts should "restrain calls for liberal or strict construction,

opting instead for a reasonable construction of all legal texts." *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29 (2018) (internal citations omitted). A reasonable construction is one that is based on the plain language of the statue. As discussed above, the statutory language of § 29(1)(a)'s three-absence provision is unambiguous, and it is clear Wilson's scenario falls within its ambit. Under any reasonable construction of § 29(1)(a), he is disqualified from unemployment benefits.

Wilson also errs when he argues that any interpretation other than the one he asks for is unfair and will lead to absurd results. (App for Lv, pp 9–11.) The result here is neither absurd nor unfair. Wilson argues that his no-call, no-shows were not his fault and were due to circumstances beyond his control. (*Id*. pp 9–13.) But he fails to assert whose fault it was that his incarceration prevented him from reporting to work or properly contacting Meijer. Wilson's actions caused him to miss work, and Wilson failed to follow Meijer's policy on calling-in. Those choices and those actions left him disqualified from receiving unemployment benefits. That result is unfortunate for Wilson, but it is not unfair or absurd.

3. Wilson's case was properly analyzed under § 29(1)(a).

Wilson appears to suggest that because he left his job involuntarily, this case should be considered under the misconduct provision of § 29(1)(b), and under that section he would not be disqualified. (App for Lv, p 14.) But Wilson has already conceded that § 29(1)(a) is the applicable provision in this case. (*Id*. pp 3, 13.)

Moreover, it is not unusual for more than one provision of the MES Act to be considered or applied in a single case. Indeed, the notice of the ALJ hearing in this case said that both §§ 29(1)(a) and 29(1)(b) could be considered. (R 39.) After hearing testimony and considered the documentary evidence, the ALJ concluded that § 29(1)(a) should apply to this case because it was the "more specific provision that covers the separation that occurred here." (R 76.) There was no error in applying § 29(1)(a) here. Indeed, even Wilson acknowledges that the ALJ's application of § 29(1)(a) was "reasonable." (App for Leave, p 13.)

CONCLUSION AND RELIEF REQUESTED

This Court should deny Leonard Wilson's application for leave to appeal because the circuit court applied correct legal principles in affirming the Appellate Commission's decision. The record supported the decision that Wilson was disqualified from receiving benefits, and that decision was consistent with law.

The Michigan Unemployment Insurance Agency therefore asks this Court to deny Wilson's application for leave to appeal.

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Dated: June 18, 2019

Claimant/Appellant Leonard Wilson's Reply Brief, July 9, 2019 Michigan Court of Appeals

IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Court of Appeals Case No. 349078

Circuit Court Case No. 18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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REPLY BRIEF AND PROOF OF SERVICE FOR CLAIMANT-APPELLANT LEONARD WILSON

ORAL ARGUMENT REQUESTED

Dated: July 9, 2019

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ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO ANALYZE AND INTEPRET THE NO CALL, NO SHOW PROVISION IN THE BROADER CONTEXT OF THE MICHIGAN EMPLOYEMENT SECURITY ACT.

In this case of first impression, this Court has both the opportunity and the authority to clarify the interpretation of a newly amended provision of the Michigan Employment Security Act ("the Act"). This is a critical question of statutory interpretation where lower courts need this Court's guidance, as shown by the ALJ's and Circuit Court's strict liability approach to the 2011 amendment to MCL 29(1)(a)'s no call, no show provision. A strict liability approach, which is not apparent in the newly amended language, deprives involuntarily unemployed claimants like Mr. Wilson of benefits specifically allocated for "persons unemployed through no fault of their own." MCL 421.2.

Two canons of statutory interpretation are particularly helpful in analyzing this provision: the whole-text canon and *noscitur a sociis*. Under the whole-text canon, the Court must examine the entirety of the Act when interpreting the no call, no show provision. Each section of the Act "exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meaning as are in harmony with the whole of the statute construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm,* 413 Mich 505, 516; 322 NW2d 702 (1982).

The Act itself declares that "[i]nvoluntary unemployment… 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." MCL 421.2. Thus, the broad purpose of the Act is to assist those such as Mr. Wilson, who find themselves involuntarily unemployed. Both the Michigan Supreme Court and Court of Appeals have consistently applied this purpose to construe the language of

the Act generously towards claimants. "The purpose of the Michigan Employment Security Act…is to safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary employment. Accordingly, the [eligibility] provisions of the act are liberally construed; disqualification provisions, however, are to be narrowly construed." *Tomei v. Gen Motors Corp*, 194 Mich App 180, 184; 486 NW2d 100 (1992).[1] In Mr. Wilson's case of first impression, this Court must interpret the disqualification effects of the 2011 amendment as disqualifying claimants for voluntary quit. As a disqualification provision, it should be construed narrowly so that Mr. Wilson and similarly situated claimants are not over disqualified for benefits.

Further, the canon of *noscitur a sociis* allows the Court to examine not only individual words and sentences in the Act, but also the company those words and phrases keep. After all, "words and clauses will not be divorced from those which precede and those which follow." *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001), quoting *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). The Agency insists that because "presumed" and "considered" are different words, they must be treated entirely independently, failing to recognize the importance of their relative location in adjacent sentences in the same subsection of the Act. Resp 11. An examination of their definitions reveals an even closer link.

[1] In arguing that the Court should not narrowly construe disqualification provisions, the Agency cites *McQueer v. Perfect Fence Co.* Resp 13-14. As *McQueer* involves the Worker's Disability Compensation Act, not the Michigan Employment Security Act, it is not binding on this Court's interpretation of the latter. Further, even if this Court were to adopt the language quoted from *McQueer*, the most "reasonable construction" of this statute would be to follow the precedent established in *Tomei*. *See also Park v Appeal Bd of Mich Employment Security Comm*, 355 Mich 103, 123; 94 NW2d 407 (1959) (holding that the MESA "should be so interpreted as to effectuate that remedial purpose implicit in its enactment"); *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 418; 565 NW2d 844 (1997) (holding that the MESA's disqualification provisions should be interpreted narrowly to "[result] in the allowance of the claims rather than their denial").

Webster's Third New International Dictionary lists eight definitions for the word "consider," of which the first ("to reflect on, think about with a degree of care or caution") and fourth ("to think of, come to view, judge, or classify") are the most applicable. *Webster's Third New International Dictionary, Unabridged Edition* (2002). There is significant room between these two definitions to offer a variety of interpretations. Fortunately, in the preceding clause of the Act, the word "presumed" offers context clarifying what is meant by "considered." *Webster's Third* contains three definitions for "presumed," with the most relevant being "to accept as true or credible without proof or before inquiry." *Id*. This definition aligns with the first definition of "consider" ("to reflect on, think about with a degree of care or caution"), as both reflect a certain degree of uncertainty, caution, and the possibility of refutation. *Id*.

Applying *noscitur a sociis*, the Court should use the nearby "presume" to color its understanding of "consider." This interpretation of the text supports a rebuttable presumption of voluntariness, as "consider" cautiously makes voluntary quit the default position, leaving room for additional information to arise. The burden to refute this presumption lies with the claimant, who must demonstrate that their no absence was involuntary. Without such an understanding, involuntarily unemployed claimants have no recourse against this provision and will unjustly be denied benefits because of circumstances outside their control. Such over disqualification contradicts the primary purpose of the Act and goes against this Court's and the Supreme Court's years of precedent.

II. A STRICT LIABILITY APPROACH TO THE NO CALL, NO SHOW PROVISION LEADS TO UNJUST AND ILLOGICAL OUTCOMES.

It is critical that the Court hear Mr. Wilson's case, as the strict liability approach to Section 29(1)(a) applied by the ALJ and the circuit court below leads to illogical and unjust outcomes. Mr. Wilson was arrested and thus unable to attend work or contact his supervisor in

the way accepted by his employer as he could only make collect calls. Thus, Wilson was involuntarily unable to attend work as he was in jail; he did not intend to quit his job, but rather, he was kept from it.[2] While it may have been reasonable for Meijer Great Lakes to terminate Wilson's employment, it is not reasonable for these involuntary circumstances to automatically and without recourse lead to voluntary quit. This ignores the critical prefix "in-" which makes "involuntary" the opposite of "voluntary." Yet the ALJ's strict liability approach to this provision would require ignoring all of the facts that show that the absences were involuntary.

The Court can avoid such a fallacy by continuing its own precedent to consider a claimant's evidence to show whether the absences were voluntary. It reasonably follows that the 2011 amendment established a rebuttable presumption of voluntariness. Such a presumption allows the no call, no show provision to remain an effective tool for employers against chronically absent employees while protecting claimants like Mr. Wilson who were absent for reasons outside of their control.

Before the 2011 amendment to MCL 421.29(1)(a), absences like Mr. Wilson's were adjudicated under a misconduct analysis. While the Agency objects to the inclusion of caselaw prior to this amendment, this history helps identify the critical issues of involuntary absences. Resp. 12. Under misconduct, the burden of proof was on the employer, who had to demonstrate that their interests were harmed by the claimant's absences. This new provision eliminates this burden on employers, shifting it instead to claimants to show whether their actions indicated that

[2] The Agency insists that Mr. Wilson's actions caused him to miss work, but this assumption is not supported in the record. Resp 14. It is undisputed that Mr. Wilson was detained involuntarily and did not wish to be arrested. Likely, the Agency is not asking for a claimant to resist arrest in order to qualify for unemployment benefits. Further, the Agency is confusing arrest with conviction, which the Act specifically clarifies (claimants are disqualified from benefits if they "[l]ost [their] job due to absence from work resulting from a violation of law for which the individual was *convicted* and *sentenced* to jail or prison"). MCL 421.29(1)(f) (emphasis added).

they intended to quit. It is now presumed that claimants left voluntarily, but they must have the opportunity to demonstrate their case, for the Act is designed to protect against "the serious menace to the health, morals, and welfare of the people of this state" that is unemployment. MCL 421.2. This reallocation of burden makes sense, as the claimant is also the party in the best position to have information regarding the voluntariness of their actions for missing 3 days of work. What used to be adjudicated as misconduct has now been reformatted into a voluntary quit case. The claimant must be given an opportunity to rebut this presumption to avoid illogical results such as declaring a man held under lock and key voluntarily absent from work.

III. THIS PROVISION SHOULD BE ANALYZED UNDER THE VOLUNTARY QUIT GUIDELINES ESTABLISHED BY *Warren v Caro Community Hospital.*

In this case, Mr. Wilson simply asks this Court to review voluntary quit cases the same way it has always reviewed voluntary quit cases. The amendment to Section 29(1)(a) of the Act shifted the question about consecutive absences from the misconduct analysis to the voluntary quit analysis. The Michigan Supreme Court in *Warren* discussed that the voluntary quit analysis requires a two-step approach. *Warren v Caro Community Hosp*, 457 Mich 361; 579 NW2d 343 (1998). First, the Court determines whether the quit was voluntary, and if involuntary, then the inquiry ends and the claimant is qualified for benefits. *Id.* Only if it is voluntary does there need to be good cause attributable to the employer in order to be qualified for unemployment benefits. *Id*.

In Mr. Wilson's case, the Court should consider his reasons showing his leaving was involuntary. He can rebut the presumption of voluntariness established by Section 29(1)(a), and thus can demonstrate that he did not leave his job voluntarily. Being detained from an arrest and unable to make anything but collect calls constitutes an involuntary absence from work. Per *Warren,* the analysis ends there, and Mr. Wilson is not disqualified from benefits. Continuing the

voluntary quit analysis to the 2011 amendment is not only consistent with precedent, but also avoids the illogical results of a strict liability approach and protects claimants who were involuntarily absent from work.

CONCLUSION

This is not the first instance where judicial intervention has been necessary to clarify the Act. For example, in *Carter*, our supreme court stepped in to establish a standard for what behavior rose to the level of employee misconduct. *Carter v Mich Employment Security Comm*, 364 Mich 538; 111 NW2d 817 (1961). In Mr. Wilson's case, similar intervention is needed to ensure proper application of the 2011 amendment to Section 29(1)(a). Without this Court's help, Wilson and similarly situated claimants will have no recourse against an unreasonable and unlawful strict liability approach to this provision. This Court should grant leave for Mr. Wilson's case.

Respectfully Submitted,

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Dated: July 9, 2019

IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

Court of Appeals Case No. 349078

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

Circuit Court Case No.18-000711-AE

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

PROOF OF SERVICE

I state that on July 9, 2019 I served a copy of the Reply Brief via USPS on the parties at the following addresses:

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Court of Appeals Order Denying Application for Leave to Appeal

Court of Appeals, State of Michigan

ORDER

Leonard Wilson v Meijer Great Lakes Limited Partnership

Docket No. 349078

LC No. 18-000711-AE

Stephen L. Borrello
Presiding Judge

Amy Ronayne Krause

Brock A. Swartzle
Judges

The Court orders that the application for leave to appeal is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT - 1 2019

Date

Chief Clerk

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

Supreme Court Case No. 163412
Court of Appeals Case No. 349078
Ingham CC No. 18-00071-AE

APPENDIX: VOLUME 3

CLAIMANT-APPELLANT LEONARD WILSON'S SUPPLEMENTAL BRIEF

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Claimant/Appellant Leonard Wilson's Brief on Application for Leave to Appeal, November 12, 2019 Michigan Supreme Court

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MSC No.

Court of Appeals No. 349078

Trial Court No. 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY

Agency-Appellee.

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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Dated: **November 12, 2019**

CLAIMANT-APPELLANT LEONARD WILSON'S APPLICATION FOR LEAVE TO APPEAL AND PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Mr. Leonard Wilson, Claimant-Appellant, files this Application for Leave to Appeal from the October 3, 2019, Order Denying Leave to Appeal. (See Appendix 1). Mr. Wilson filed a Claim of Appeal asking the Ingham County Circuit Court to review a final decision of the Unemployment Insurance Appellate Commission ("UIAC") holding him disqualified for unemployment insurance benefits under Section 29 of the Michigan Employment Security Act. (See Appendix 2). Mr. Wilson filed pro se a timely motion for reconsideration on May 3, 2019. (See Appendix 3). On May 6, 2019, the Ingham County Circuit Court issued an order denying Mr. Wilson's Motion for Reconsideration and affirming its April 12, 2019 Order and Opinion Affirming Agency Decision. (Appendix 4). Mr. Wilson then filed an Application for Leave to Appeal to the Court of Appeals, which was denied on October 3, 2019. Mr. Wilson files this Application for Leave and asks this Court to grant his application, reverse the lower court's decisions, and hold that he is not disqualified from receiving unemployment insurance benefits. In the alternative, Mr. Wilson asks that, in lieu of leave granted, this Court remand the matter to the Court of Appeals for consideration as on leave granted pursuant to MCR 7.305(H)(1). Pursuant to MCR 7.302(C)(2), this Application for Leave to Appeal is filed within 42 days of the October 3, 2019, Order Denying Leave to Appeal.

QUESTIONS PRESENTED

I. The Michigan Supreme Court established a two-step test in *Warren*[1] for cases adjudicated under the voluntary quit provision of the Michigan Employment Security Act ("MESA"). The first step of the *Warren* test mandates an inquiry into the circumstances surrounding a claimant's separation to determine whether the separation was voluntary. Here, the lower courts used a strict liability framework and gave no consideration to the circumstances surrounding Mr. Wilson's separation. Did the lower courts err in failing to review whether Claimant Leonard Wilson's absences were voluntary?

Wilson-Appellant's answer:	Yes.
Agency-Appellee's answer:	Presumed No.
Employer-Appellee's answer:	Presumed No.

II. The Michigan Supreme Court and the Court of Appeals agree that because MESA is "a remedial act," it should be liberally construed in favor of providing benefits, and "disqualification provisions…are to be narrowly construed" when denying benefits. Yet, the lower courts in this case decided that MCL 421.29(1)(a), a disqualification provision regarding voluntary leaving, should impose strict liability against Claimant Leonard Wilson to broadly disqualify him unemployment compensation no matter the circumstances. Were the lower courts' decisions contrary to law?

Wilson-Appellant's answer:	Yes.
Agency-Appellee's answer:	Presumed No.
Employer-Appellee's answer:	Presumed No.

[1] *Warren v Caro Community Hosp*, 457 Mich. 361, 365 (1998).

INTRODUCTION

This is a case of first impression on the "no call, no show" clause of the Michigan Employment Security Act ("MESA"). In 2011, the Michigan Legislature amended Section 29 of MESA to say that when an employee accrues three consecutive absences from work without providing notice in a manner appropriate to the employer, resulting separations are adjudicated under the Act's voluntary leaving provision – and claimants have the burden to show that the quit was not disqualifying. Before this amendment, similar separations were adjudicated under the misconduct provision and courts reviewed whether the employer could prove their burden that the claimant's absences amounted to misconduct. See, e.g., *Wickey v Appeal Bd of Michigan Employment Security Comm,* 369 Mich. 487, 503-04 (1963); *Jenkins v Appeal Bd of Michigan Employment Security Comm*, 364 Mich. 379, 379 (1961). Though MESA's preamble and this Court's jurisprudence provide clear guidance as to the proper interpretation of the "no call, no show" clause, no binding resolution interpreting this recent amendment exists.

By turning the question of the claimant's absences from a misconduct question to a voluntary quit question, the legislature changed which party has the burden. The amendment merely shifted the burden from employers to claimants to prove the voluntariness of three or more consecutive absences. On its face, the "no call, no show" clause is consistent with this Court's jurisprudence on voluntary quit, which established that absence from work is not disqualifying unless the absence was first shown to be voluntary and without good cause. *Warren v Caro Community Hosp*, 457 Mich. 361, 365 (1998).

However, the lower courts in Mr. Wilson's case did not apply this Court's voluntary quit jurisprudence. Instead, the lower courts adopted their own strict liability approach to this voluntary quit case and found that there are no facts Mr. Wilson could present to overcome a

disqualifying quit. Mr. Wilson's case illustrates the problem with the lower courts' interpretation. Mr. Wilson was arrested and was temporarily unable to get to work or contact his employer's attendance hotline[2] for three consecutive days. But Mr. Wilson tried to call his employer using the only means he had available – collect calls – which his employer did not accept. Because of these absences from work, the lower bodies held Mr. Wilson voluntarily quit his job and gave no consideration to the facts surrounding why he could not get to work or call in appropriately. In all other applications of MESA, the circumstances surrounding his "voluntary quit" would be considered and appropriately weighed. Yet here, the ALJ took a "strict liability" approach finding Mr. Wilson's involuntary incarceration would not be considered, thereby disqualifying Mr. Wilson from benefits. This "strict liability" approach to Mr. Wilson's case is contrary to this Court's voluntary quit jurisprudence and should be overturned.

The Act is intended to provide relief from hardship caused by involuntary unemployment and deserves liberal application by the courts. The preamble states that "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 or her family." MCL 421.2. "It has long been the holding in Michigan that. . . . disqualification provisions should be narrowly construed in favor of those involuntarily unemployed through no fault of their own." *Chrysler Corp v DeVine*, 92 Mich. App. 555, 558 (1979).

This Court should grant Mr. Wilson's application because the issues involved question whether the lower courts are validly interpreting the MESA, the legislative act governing unemployment. Public interest is impacted by the lower courts' decision because claimants will

[2] Meijer Great Lakes operates a call-in "attendance hotline" that allows employees to call-in when they are going to miss work. R 20.

be over-disqualified for benefits. This Court expressly decided that this legislative act should be narrowly construed in favor of claimants. Mr. Wilson respectfully requests that this Court enter an Order: (1) granting his application for leave to appeal and allowing this appeal to proceed as an appeal of right; or (2) peremptorily reversing the circuit court's order and instead holding that Claimant-Appellant is not disqualified for benefits under MCL 421.29; and (3) awarding Claimant-Appellant all other relief that this Honorable Court finds to be appropriate under the circumstances.

STATEMENT OF FACTS AND PROCEEDING

Leonard Wilson began working for Meijer Great Lakes in October 2014, where he served as an assistant team member. (Circuit Court Decision pg 2, Appendix 2).

Mr. Wilson is involuntarily arrested and incarcerated

On a day off from work, September 4, 2017, the police arrested Mr. Wilson and took him to jail. R 27.[3] He remained in jail for two weeks until his friends could help him post bond. R 28, 30. Mr. Wilson knew that Meijer Great Lakes had a strict attendance policy requiring employees to "notify their leadership of an absence" at least sixty minutes before the start of their scheduled shift if they were going to miss work. R 50-51. Fearing he might lose his job if he did not get in touch with his supervisor, Mr. Wilson used the only resource he had to contact Mr. Wykes – a collect call from the jailhouse telephone. R 25, 29.

Mr. Wilson's attempted to call his employer on September 4

After he was taken to jail on September 4, Mr. Wilson attempted to contact his supervisor, Mr. Todd Wykes to alert him of the situation. R 25. The only way Mr. Wilson could call his supervisor was through a hotline manned by "Asset Protection people." R 20. The

[3] All record cites are pulled from Appendix 8, the certified record from the Michigan Compensation Appellate Commission.

problem was the hotline did not accept collect calls. R 29. This meant that when Mr. Wilson called the hotline, no one responded. R 35.

Mr. Wilson attempted to call his employer on September 5

But Mr. Wilson did not give up trying to save his employment. The next day, September 5, he used his one courtesy call to contact Mr. Wykes. R 30. Unfortunately, Mr. Wykes did not respond. R 25. Persisting still, Mr. Wilson called Meijer's guard shack, which is the security booth at Meijer where Mr. Wykes was often stationed. R 25. While Mr. Wykes was again not available, Mr. Wilson asked the guard shack to leave a message for his supervisor explaining that he would be unable to come to work. R 25.

Mr. Wilson tried to obtain funds to continue to call his employer, but he was terminated before he received them

In the days following his second night in jail, Mr. Wilson knew that he needed to keep calling his supervisor to alert his employer of his inability to come to work. However, Mr. Wilson's only resource to call his employer, using collect calls, was an impossible option—he simply had no more money to place calls. R 29. He tried to obtain funds from family and friends to place subsequent calls to his supervisor during the additional ten days he was in jail. R 29. But, by the time he received additional funds, Meijer Great Lakes had already discharged him. As soon as Mr. Wilson was released from jail, he called his supervisor to confirm what he feared—that he had been discharged for violating the attendance policy. R 21, 26.

Every step of the way, Mr. Wilson attempted to contact his supervisor in order to not be a "no call, no show." However, due to circumstances that even Administrative Law Judge Wahl admitted were "beyond his control," Mr. Wilson was unable to reach his employer. R 76. Mr. Wilson, a faithful employee for three years, was discharged from Meijer and then denied

unemployment benefits for "voluntarily" quitting his job, despite that he tried to do everything within his power to keep his employment and had no desire to leave his job.

Procedural history

The Michigan Compensation Appellate Commission ("MCAC")[4] affirmed ALJ Wahl's decision to deny Mr. Wilson unemployment benefits. R 82. The Ingham County Circuit Court issued an order affirming this decision. Mr. Wilson filed pro se a timely motion for reconsideration. The Ingham County Circuit Court issued an order denying the motion and affirming its prior order and opinion. Mr. Wilson then sought leave to appeal to the Court of Appeals, which the Court of Appeals denied on October 3, 2019. Mr. Wilson now seeks leave to appeal this matter to the Supreme Court.

STANDARD OF REVIEW

The Supreme Court reviews the Circuit Court's legal conclusions *de novo* and factual findings for clear error. *Bauserman v Unemployment Insurance Agency*, 503 Mich. 169, 177 (2019). The central issue in this appeal is whether MCL 421.29 is a strict liability statute to be construed narrowly against claimants. This is a matter of statutory interpretation. Questions of statutory interpretation are considered questions of law. *McCahan v Brennan,* 492 Mich. 730, 736 (2012). Therefore, this Court should review the circuit court's application of MCL 421.29 *de novo*.

[4] This summer MCAC changed its name to the Unemployment Insurance Appeallete Commission ("The Commission").

ARGUMENT

I. THE "NO CALL, NO SHOW" PROVISION FITS SQAURELY WITHIN THIS COURT'S WELL ESTABLISHED VOLUNTARY QUIT PRECEDENT.

The newly amended "no call, no show" clause was written into the voluntary quit provision of MESA. MCL 421.29(1)(a). This Court established a test for cases adjudicated under the voluntary quit provision in *Warren*, first requiring the court to consider the facts surrounding separation to determine whether the leaving was voluntary. *Warren*, 457 Mich. at 365 (1998). If the leaving was involuntary, the inquiry stops there, and the claimant is not disqualified from benefits. *Id.* The test for cases arising under the voluntary quit provision is well-established, yet the lower courts failed to apply the test in Mr. Wilson's case when analyzing the "no call, no show" clause under the voluntary quit provision. This analysis runs in direct contravention of this Court's voluntary quit precedent. Because of the lower courts' confusion, this Court's guidance is necessary to clarify how the "no call, no show" provision should be reviewed.

A. This Court already established the Test for Voluntary Quit Cases in *Warren*.

MESA states that an individual is disqualified from benefits, "if he or she...left work voluntarily without good cause attributable to the employer." MCL 421.29(1)(a). Before the issue of good cause attributable to the employer can be addressed, a plain reading of the text requires a determination that the separation was done voluntarily by the employee. This natural textual reading is confirmed in *Warren*, 457 Mich. at 366.

The Supreme Court in *Warren* established that Section 29(1)(a) creates a two-prong test for when a claimant quits her employment. The first prong is to determine whether the claimant quit work voluntarily. If the claimant quit work involuntarily, that is the end of the inquiry and the claimant is entitled to unemployment benefits. *Id*. at 366. "Whether a person left voluntarily will depend on the particular facts and circumstances of the case." *Id.* at 367. Further, a leaving

is not voluntary if the claimant did not have a choice between two reasonable alternatives. *Id.* at 368.

In *Sheppard*, the Court of Appeals found that the lower courts erred when it determined that the claimant voluntarily quit her job when she took a two-month leave of absence. *Sheppard v Meijer Great Lakes*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No. 300681), p 1 (Appendix 6). Relying on *Warren*, the Court of Appeals analyzed the difference between a voluntary and involuntary departure and held that "a voluntary departure is an intentional act." *Id.* at 4 (quoting *Ackerberg v Grant Community Hosp*, 138 Mich. App. 295, 300 (1984)). The court specifically "decline[d] to create a doctrine of constructive voluntary leaving applicable where, as here, the claimant was in fact discharged and the employer failed to sustain the discharge as one for misconduct connected with work." *Id.*

Just as the employees in *Sheppard* and *Warren* did not leave their jobs voluntarily, neither did Mr. Wilson. His incarceration was involuntary. Mr. Wilson did not choose to be confined, and he did not choose to miss work. Mr. Wilson was only able to leave jail as fast as he could raise money for bail. He was unable to contact his employer each day he missed work because his employer did not take collect calls. Further, his access to the phone in jail was limited. His only remaining option was to break out of jail to get to work. Mr. Wilson was left to accept his firing and subsequent disqualification from benefits for "voluntarily" leaving his job for reasons beyond his control.

B. The "No Call, No Show" Amendment Changed the Court's Analysis from Misconduct Jurisprudence to Voluntary Quit Jurisprudence, and Likewise Moved the Burden from the Employer to Prove Disqualification to the Claimant Proving Qualification. It did not Create a New Standard for Voluntary Quit Cases.

Prior to the amendment, "no call, no show" separations similar to the one here were adjudicated under the separate misconduct provision. *See, e.g.*, *Wickey v Appeal Bd of Michigan Employment Security Comm*, 369 Mich 487, 503-04 (1963); *Jenkins v Appeal Bd of Michigan Employment Security Comm*, 364 Mich. 379, 379 (1961); *Sullivan v Appeal Bd Michigan Employment Security Comm*, 358 Mich. 338, 339-40 (1960); *Thomas v Employment Security Comm*, 356 Mich. 665, 669-70 (1959). In these cases, the courts reviewed a claimant's absences to consider whether the separation amounted to misconduct to disqualify them from unemployment benefits. Generally, if the claimant had a good reason for missing work which was outside the claimant's control, the claimant was not disqualified from benefits. *Washington v Amway Grand Plaza*, 135 Mich. App. 652, 658 (1984) ("[C]laimant's tardiness or absences cannot support a finding of statutory misconduct unless it is determined that they were without good cause, which could include personal reasons or other reasons beyond claimant's control.").

The Legislature amended MESA in 2011 to include a clause specifically relating to claimants who accrue three consecutive absences. MCL 421.29(1)(a) ("An individual who left work is *presumed* to have left work voluntarily. . . . An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer. . . . shall be considered to have voluntarily left work. . . .") (emphasis added). Thus, prior to the amendment, the burden initially rested with employers to prove the separation was voluntary. Under this misconduct inquiry, employers held the burden to show the separation was voluntary and that an employee did not have a good reason for consecutive absences. The amendment moved the analysis to the voluntary quit provision, which presumes the separation is voluntary. Thus, the

burden shifted to claimants to rebut this presumption of voluntariness, the same framework used in voluntary quit cases.

The amendment simply moved the inquiry from a misconduct test to a voluntary quit test. The amendment did not disturb the separate and distinct misconduct and voluntary quit inquiries. It follows that courts should use the *Warren* test when applying the amended provision as it now rests under the voluntary quit provision. But, instead of following this Court's established jurisprudence on voluntary quit, the ALJ created a new strict liability standard.

The ALJ's strict liability approach dismantles this Court's well-established *Warren* test for voluntary quit inquiries. The amendment merely shifted the burden from employers to claimants to prove the voluntariness of three or more consecutive absences. It did not amend the voluntary quit provision to impose strict liability. Indeed, nothing in the plain language of the amendment nor the language of the voluntary quit provision suggests a strict liability standard. Further the MESA's preamble and precedent shows that a strict liability approach is contrary to law. MESA's preamble and precedent also indicate that the standing voluntary quit analysis should apply and the circumstances of the separation should be considered instead of finding disqualification automatically. This Court's guidance is necessary to review how the "no call, no show" amendment impacts disqualification from benefits.

C. The ALJ's Interpretation of Section 29 Refuses to Consider the Facts Surrounding the Separation.

In Mr. Wilson's case, lower bodies failed to initially determine whether the absence was voluntary, and instead ruled that any facts surrounding Mr. Wilson's separation had no bearing on disqualifying him under Section 29(1)(a). This Court's precedent and Congressional intent indicate that, under MESA as amended, the "no call, no show" clause moved the burden from the employer to the claimant to prove whether the leaving was voluntary. But this did not change the

claimant's right to provide the court with reasoning to show that they should not be disqualified. This amendment therefore gives rise to a rebuttable presumption of voluntary leaving.

The plain interpretation of the text places the burden on the claimant to show evidence that rebuts the presumption of disqualification. Yet, the lower bodies in Mr. Wilson's case created a strict liability approach that refused to consider any fact that Mr. Wilson brought to show that he should be able to obtain benefits. A strict liability approach dangerously incentivizes the administration of unemployment compensation in irrational and unequitable ways.

Since the 2011 amendment, no case expressly addresses the standard for reviewing consecutive claimant absences from within the voluntary quit section. In *Sheppard*, Meijer Great Lakes discharged the claimant after a miscommunication when she requested a leave of absence. *Sheppard,* Docket No. 300681 at 3-4 (Appendix 6). Both the claimant and her supervisor believed the other had submitted the required paperwork. *Id*. Meijer interpreted her mistake as a voluntary departure. *Id*. The Court of Appeals "specifically declined to create a doctrine of constructive voluntary leaving applicable where. . . . the claimant was in fact discharged and the employer failed to sustain the discharge as one for misconduct." *Id*. at 4. The Court of Appeals vacated the Circuit Court decisions and remanded for reinstatement of the claimant's unemployment compensation. *Id*. at 6. Because the Circuit Court did not analyze whether the claimant voluntarily left her employment under section 29(1)(a), and because there was no evidence that the claimant was absent on any days, the Court of Appeals did not address the proper standard under voluntary leaving as amended. *Id.* at 5.

In *Thomas*, the claimant was absent from work after being arrested while driving to work. *Thomas*, 356 Mich. at 667. The Supreme Court of Michigan held that "[d]oing an act, even

though voluntarily, which results, contrary to the doer's hopes, wishes and intent, in his being kept forcibly from work is not the same as voluntarily leaving work." *Id*. at 669. Thomas was found not disqualified from unemployment compensation. *Id*. at 670. A claimant cannot at once be forcibly kept from work and voluntarily quit work. *Id*. at 669.

Here, nothing about the nature of Mr. Wilson's separation suggests he was acting in pursuit of his wishes and intent. Like *Thomas*, Mr. Wilson was forcibly kept from his work. He did not voluntarily choose to miss three consecutive days of work. Yet, the ALJ below unlawfully created a doctrine of constructive voluntary leaving where the claimant was in fact discharged and the employer failed to establish misconduct. Because ALJ Wahl explicitly invoked Mr. Wilson's three consecutive absences, the current case affords this Court the opportunity to establish the proper standard under Sections 29(1)(a) and ensure that the provision is consistently and fairly applied by the Agency, ALJs and lower courts.

D. The ALJ's Strict Liability Interpretation of Section 29 Ignores Congressional Intent for MESA to Serve as a Remedial Statute that Provides Unemployment Compensation to Michigan Workers.

Not only does a strict liability interpretation cut against precedent, but it runs afoul of legislative intent. MESA's preamble declares that "[i]nvoluntary unemployment. . . . 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 or her family, to the detriment of the welfare of the people of this state." MCL 421.2. The Act evinces an interest in giving unemployment benefits to "those who are unemployed because of forces beyond their control." *Tomei v Gen Motors Corp*, 194 Mich. App. 180, 183 (1992).

Michigan Courts have repeatedly emphasized the remedial intent of MESA time and time again. The Courts have said MESA is to be "liberally construed" in favor of providing benefits

and "disqualification provisions. . . . are to be narrowly construed." See, e.g., *Tomei*, 194 Mich. App at 183-84; *Empire Iron Mining Partnership v Orhanen*, 455 Mich. 410, 417 (1997); *Park v Appeal Bd of Mich Employment Security Comm*, 355 Mich. 103, 123 (1959). This involves interpreting its provisions so as to "[result] in the allowance of the claims rather than their denial." *Empire Iron Mine P'ship*, 455 Mich. at 417 (internal citation omitted). Accordingly, courts should narrowly construe sections of the Act that disqualify claimants and liberally construe sections that provide claimants with benefits. *Tomei*, 194 Mich. App. at 184.

In contravention of the basic intent of MESA, ALJ Wahl liberally construed the voluntary quit disqualification provision to broadly disqualify claimants under this Section. This construction creates a strict liability approach to deny claimants who would otherwise not be disqualified for absences beyond their control.

This same misstep had previously been reversed by the Court of Appeals. In *Tomei*, the employer gave the claimant a Hobson's choice: either stay at his current plant until it closed down or transfer to a new plant. *Id*. at 182. When the claimant decided to stay and filed for unemployment insurance after the plant closed, the Agency liberally applied the voluntary quit provisions to disqualify him from benefits. *Id*. at 183. The Court of Appeals reversed the decision, construing the voluntary quit provision narrowly in order to grant benefits. The Court of Appeals found that nothing about his choice was "voluntary," since he "was forced to choose between *untenable* options in the face of an indeterminate future." *Id*. at 188 (emphasis added).

Here, the ALJ's expectations gave Mr. Wilson "untenable" choices. He could find a way to communicate each day of his detention with his employer—who did not accept collect calls—by raising funds and requesting courtesy calls. He could break out of jail to get to work. Or he could otherwise accept a discharge that would disqualify him from unemployment compensation.

The ALJ's strict liability ruling is an application of MESA against claimants that directly contravenes Congressional intent. This Court should construe the voluntary quit provision narrowly to reverse the lower courts' decisions, because nothing about Mr. Wilson's choice was "voluntary" since he did not leave his job voluntarily. The reason he did not go to work was outside of his control. Thus, the current case affords this Court the opportunity reaffirm Congressional intent and to ensure that Section 29 is consistently applied by the Agency, ALJs, and lower courts.

II. THIS COURT HAS THE AUTHORITY TO ANALYZE THIS CASE OF FIRST IMPRESSION AND INTERPRET THE "NO CALL, NO SHOW" PROVISION TO PRODUCE JUST RESULTS IN THE CONTEXT OF THE ACT.

This case of first impression presents a critical question of statutory interpretation where lower courts need this Court's guidance. Until now, lower courts have incorrectly read the no call, no show provision to impose strict liability. A strict liability interpretation is not supported by the newly amended language. Further, a strict liability approach unfairly deprives involuntarily unemployed claimants like Mr. Wilson benefits specifically allocated for "persons unemployed through no fault of their own." MCL 421.2.

Two textual canons of statutory interpretation are particularly helpful in analyzing this new provision: the whole-code canon and *noscitur a sociis*. First, under the whole-code canon, the Court examines and considers the entirety of the Act when interpreting the no call, no show provision. Each section of the Act "exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meaning as are in harmony with the whole of the statute construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm,* 413 Mich. 505, 516 (1982).

The Act itself declares that "[i]nvoluntary unemployment. . . . 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." MCL 421.2. Thus, the broad purpose of the Act is to assist those such as Mr. Wilson, who find themselves involuntarily unemployed. Both the Michigan Supreme Court and Court of Appeals have consistently applied this purpose to construe the language of the Act generously towards claimants. "The purpose of the Michigan Employment Security Act. . . . is to safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary employment. Accordingly, the [eligibility] provisions of the act are liberally construed; disqualification provisions, however, are to be narrowly construed." *Tomei*, 194 Mich. App. at 184. Here, the Court must interpret the disqualification effects of the no call, no show amendment as disqualifying claimants for voluntary quit. As a disqualification provision, the language should be narrowly construed so that Mr. Wilson and similarly situated claimants are not unjustly disqualified for benefits.

Second, by applying the canon *noscitur a sociis,* the Court can clarify the use of the term "consider" within the no call, no show amendment. *Noscitur a sociis* is a cannon used to provide meaning to ambiguous words by considering the company those words and phrases keep. Indeed, this Court has said, "Words and clauses will not be divorced from those which precede and those which follow." *People v Vasquez*, 465 Mich. 83, 89 (2001), quoting *Sanchick v State Bd of Optometry*, 342 Mich. 555, 559 (1955).

Applying *noscitur a sociis* here, the Court should use the nearby term "presume" to color its understanding of "consider" within the no call, no show provision. MCL 421.29(1)(a) ("An individual who left work is presumed to have left work voluntarily. . . . An individual who is absent from work for a period of 3 consecutive work days or more without contacting the

employer. . . . shall be considered to have voluntarily left work. . . .”). Because this portion of the Act is a disqualification provision, it is more appropriate to employ a narrow reading of the now effective voluntary quit provision and interpret “considered” as analogous to “presumed.” This interpretation of the text supports a rebuttable presumption of voluntariness, as “consider” cautiously makes voluntary quit the default position, leaving room for additional information to arise. *Webster’s Third New International Dictionary* lists eight definitions for the word “consider,” of which the first (“to reflect on, think about with a degree of care or caution”) and fourth (“to think of, come to view, judge, or classify”) are the most applicable. *Webster’s Third New International Dictionary, Unabridged Edition* (2002). There is significant room between these two definitions to offer a variety of interpretations. Fortunately, in the preceding clause of the Act, the word “presumed” offers context clarifying what is meant by “considered.” *Webster’s Third* contains three definitions for “presumed,” with the most relevant being “to accept as true or credible without proof or before inquiry.” *Id*. This definition aligns with the first definition of “consider” (“to reflect on, think about with a degree of care or caution”), as both reflect a certain degree of uncertainty, caution, and the possibility of refutation. *Id*.

The burden to refute the rebuttable presumption of voluntariness lies with the claimant, who must demonstrate their absence was involuntary. Without such an understanding, involuntarily unemployed claimants have no recourse against this provision and will unjustly be denied benefits because of circumstances outside their control. It prevents the “untenable” situation like Mr. Wilson’s case where a claimant, otherwise not disqualified under misconduct, is disqualified under voluntary leaving despite party agreement that he was terminated due to involuntary absences. Mr. Wilson was not asking for his job back; he was merely asking for unemployment compensation to which he was entitled after three years of employment with

Meijer Great Lakes. In accordance with its purpose, MESA should be read to disqualify only those claimants whose absences are voluntary.

A. When a Claimant is Unable to Contact Their Employer, a Strict Liability Approach to the No Call, No Show Provision Leads to Unjust and Illogical Outcomes.

It is not unreasonable for employers to discharge employees who fail to come to work for three consecutive days without providing appropriate notice. However, it is unreasonable to disqualify those claimants from unemployment compensation when the absences resulted from circumstances beyond the claimants' control. Here, ALJ Wahl applied a strict liability standard, concluding that Mr. Wilson's reason for three consecutive absences, though "beyond his control," was categorically irrelevant to disqualification under Section 29. R 76. (See Appendix 5). This application, if not reversed, will necessarily lead to absurd and unjust results.

In 1996, the Court of Appeals heard a case factually analogous to Mr. Wilson's. *Guebara v Muskegon Aluminum Foundry*, unpublished per curiam opinion of the Court of Appeals, issued September 27, 1996 (Docket No. 180648) (Appendix 7). The claimant was arrested and could not post bond. *Id*. at 1. He was subsequently terminated for violating his employment contract after three consecutive absences without notifying his employer. *Id*. at 1-2. The Court of Appeals remanded the case for the Agency to determine if the claimant's absences and inability to post bond were beyond his control. *Id*. If beyond his control, the Court of Appeals found that there was no misconduct and he was not disqualified. *Id*. The Court of Appeals did not address whether Guebara was disqualified under the voluntary leaving provisions as the case arose before the 2011 amendment. However, it follows that that if the inability to post bond was beyond his control, the claimant could not have voluntarily left his employment to be disqualified from benefits.

Statutes "should be construed to prevent absurdity, hardship, injustice, or prejudice to the public interest" *Franges v General Motors Corp*, 404 Mich. 589, 612 (1979). Here, the ALJ placed an onerous and unlawful burden on Mr. Wilson by finding the claimant's detention irrelevant to the disqualification analysis under the voluntary leaving provision. ALJ Wahl demanded that, while detained, Mr. Wilson find a way to raise money to call his employer who would not accept collect calls from the jail. This demand will lead to great hardship for claimants and absurd results. For example, the Agency could automatically disqualify a claimant who is in a coma after a car accident and is therefore medically incapable of notifying his employer of the circumstances within three days.

A strict liability approach to this 2011 amendment would result in countless unemployed claimants who are overly disqualified from benefits, despite having acted without fault. Claimants such as these are insisting on basic equity; they are also invoking the statutory protections of a remedial Act designed by its drafters to do away with "the disastrous effects of involuntary unemployment." MCL 421.2. Protecting the involuntarily unemployed means protecting those who are unemployed "through no fault of their own" MCL 421.2(1). Claimants who are detained and unable to access funds to make calls or to convince guards to allow them to make courtesy calls at times potentially convenient to an employer cannot seriously be said to be at fault. Yet that is precisely what strict liability assumes. Mr. Wilson did everything he could; it still was not enough for his employer.

The strict liability standard will give employers and the Agency carte blanche to impose whatever conditions they wish upon absent employees who have no intention to miss work, let alone quit. Under a strict liability construction of the no call, no show clause, even a claimant who has recovered from a prior medical condition that rendered them unable to call for three

days would still be disqualified from receiving benefits. This is an absurd result from an amendment that sought only to shift the burden of proof in cases of consecutive absences so that, for example, a claimant who took vacation without informing their employer would be disqualified from unemployment compensation. The amendment sought only to disqualify claimants who voluntarily acted to effectuate separation from employment.

ALJ Wahl's narrow analysis supports a reading of MESA that will lead to absurdity and great hardship for claimants in contravention of the Act and this Court's decisions. Under ALJ Wahl's interpretation, a claimant who cannot call their employer due to circumstances beyond the claimant's control is automatically disqualified from unemployment compensation after three consecutive days.

CONCLUSION

For the above-stated reasons, Claimant Leonard Wilson respectfully requests that this Court grant leave to appeal pursuant to MCR 7.305(B), or remand the matter to the Court of Appeals for consideration, pursuant to MCR 7.305(H)(1).

Respectfully Submitted,

University of Michigan Law School
Workers' Rights Clinic

Dated: November 12, 2019

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STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MSC No.

Court of Appeals No. 349078

Trial Court No. 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY

Agency-Appellee.

PROOF OF SERVICE

I certify that a copy of the forgoing brief for Claimant-Appellant Leonard Wilson was served upon:

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Agency/Appellee Unemployment Insurance Agency's Brief in Opposition, December 10, 2019 Michigan Supreme Court

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Agency-Appellee.
_____/

Supreme Court No. 160530

Court of Appeals No. 349078

Ingham County Circuit Court
No. 18-000711-AE

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S BRIEF IN OPPOSITION TO WILSON'S APPLICATION FOR LEAVE TO APPEAL

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Dated: December 10, 2019

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COUNTER-STATEMENT OF JURISDICTION

In accordance with MCR 7.312(A) and MCR 7.212(D)(2), the Michigan Unemployment Insurance Agency agrees that Leonard Wilson timely sought leave to appeal the Michigan Court of Appeals' October 1, 2019 order denying leave to appeal. MCR 7.305(C)(2)(a). Thus, this Court has jurisdiction over Wilson's appeal under MCR 7.303(B)(1). In accordance with MCR 7.305(D), the Agency timely files this answer in opposition to the application for leave to appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Michigan law disqualifies an individual from unemployment benefits when they voluntarily leave work without good cause attributable to their employer, including where they are gone for three or more consecutive days without contacting their employer. The Michigan Compensation Appellate Commission held that Leonard Wilson was disqualified from receiving unemployment benefits because he had three consecutive absences without appropriately contacting his employer. Did the circuit court and Court of Appeals apply correct legal principles in affirming the Commission's decision?

Appellant Wilson's answer:	No.
Appellee Agency's answer:	Yes.
Appellee Meijer Great Lakes' answer:	Unknown.
Circuit court's answer:	Yes.
Court of Appeals' answer:	Yes.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 6, section 28, of Michigan's 1963 Constitution

> 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.

MCL 421.29(1)(a) Disqualification from benefits.

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> > (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.
>
> * * *

MCL 421.38(1) Review by circuit court; direct appeal of order or decision of administrative law judge; unemployment agency as party; manner of appeal.

> The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds

that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

INTRODUCTION

Our Legislature has made clear that not all unemployed workers in Michigan are qualified to receive unemployment benefits. The applicable statute has several disqualification provisions, and the one at issue in this case is straightforward and requires no interpretation. If a worker is absent from work for three or more consecutive workdays without properly contacting their employer, they are considered to have voluntarily left their employment without good cause attributable to their employer, and they are disqualified from receiving benefits as a matter of law.

The record establishes that Leonard Wilson missed more than three consecutive workdays without properly contacting his employer. He was arrested and jailed on charges of possessing a controlled substance and had limited communication options. He contacted his employer once, but offered no specifics about why he would not be at work that day or about how long he would be away from work. After that, he went a week and a half without contacting his employer.

Each administrative body and the circuit court concluded that Wilson was disqualified from receiving benefits under the plain language of the applicable provision. The Court of Appeals denied Wilson's application for leave to appeal. Wilson asserts that the application of the provision in this case runs afoul of general concepts of unemployment law, but this is not so. Applying the clear language of the provision honors legislative intent.

Because the circuit court applied correct legal principles, the Court of Appeals correctly denied leave to appeal, and this Court should do the same.

COUNTER-STATEMENT OF APPLICABLE LAW, FACTS, AND PROCEEDINGS

A. Applicable unemployment law

The Michigan Employment Security Act (MES Act) disqualifies individuals from receiving unemployment benefits under certain circumstances. MCL 421.29. Of relevance here, the MES Act disqualifies an individual who voluntarily leaves work without good cause attributable to their employer. MCL 421.29(1)(a). Where a person is absent for three or more consecutive workdays without appropriately contacting the employer, they are considered to have left voluntarily without good cause attributable to the employer. *Id*. This is colloquially known as the "no-call, no-show" provision.

B. Nature of the dispute

Leonard Wilson began working for Meijer in October of 2014 as a selector, and later became an assistant team member. (R 19.)[1] Wilson's schedule was generally consistent—his shifts began at 6:45 a.m., and he usually had Thursdays and Saturdays off. (R 19–20.) But Wilson's employment ended in early September 2017 when he failed to report to work for several days and failed to notify Meijer that he would not be reporting to work.

[1] "R" citations refer to the Certified Record of Proceedings filed with the circuit court on or about November 20, 2018, by the Michigan Compensation Appellate Commission. This record is included as Part 8 of the appendix attached to Wilson's brief in support of his application for leave.

According to Wilson's supervisor, Todd Wykes, Wilson was scheduled to work six days in a row during the week at issue, beginning Sunday, September 3, 2017, with his next day off being Saturday, September 9, 2017. (R 34–35.) Wykes testified that while Wilson often had Thursdays off, he was scheduled to work Thursday, September 7, 2017. (R 34.)

But Wilson was absent September 4, 2017, and he failed to call in. (R 20). According to Wykes, Wilson was absent again the next day, but this time he called Meijer's guard shack to say he would not be in. (*Id.*) Wilson was also absent the next three days, September 6–8, 2017, and did not contact Meijer any of those days. (R 20, 22.) Noting Wilson's absence and failure to contact them, Wykes called Wilson twice, but received no response. (R 21.) Meijer then terminated Wilson's employment because of his multiple no-call, no-show absences. (*Id.*) His effective separation date was noted as September 3, 2017, his last day worked. (R 22.)

As it turned out, Wilson was absent during the week at issue because he had been arrested on September 4, 2017 for possession of a controlled substance, and he remained in jail until he was able to post bond on September 17, 2017. (R 26–28.) Wilson acknowledged his only call to Meijer during his incarceration was the phone call to the guard shack on the afternoon of September 5, 2017. (R 25.) He indicated he called there because he was unable to reach his supervisor on the phone, and that he left a message saying he was not able to make it to work that day due to "unusual circumstances." (*Id.*) Wykes did not recall Wilson ever reporting that he was in jail. (R 35.) Wilson did not make further contact with Meijer because he

could make only collect calls, which Meijer would not accept. (R 29.) Wilson was aware that Meijer had a policy allowing it to end his employment after he failed to appear for three consecutive shifts, and when he finally got out of jail, he assumed he no longer had a job due to his absences. (R 21, 30.)

C. Administrative proceedings

1. The Unemployment Insurance Agency determines that Wilson is disqualified from receiving benefits.

On October 2, 2017, the Agency issued a determination finding Wilson disqualified for unemployment benefits because his attendance issues constituted work-related misconduct. (R 71.) Wilson protested, and in a redetermination dated October 27, 2017, the Agency affirmed its decision. (R 69.)

Wilson filed a late protest of the redetermination, which the Agency denied as untimely. (R 68.) Wilson then appealed and asked for a hearing before an administrative law judge.

2. The Administrative Law Judge affirms that Wilson is disqualified from receiving benefits, but modifies the Agency's basis for the disqualification.

Wilson and Meijer representatives appeared before administrative law judge Douglas Wahl on May 31, 2018. (R 1–38.) Based on the testimony and evidence presented, ALJ Wahl held that Wilson had good cause for his late protest to the October 27, 2017 redetermination because he did not receive it. (R 75–76.)

On the merits of Wilson's claim for unemployment benefits, ALJ Wahl affirmed the Agency's conclusion that Wilson was disqualified, but based that

conclusion on a different section of the MES Act. The ALJ held that Wilson's numerous absences fit better within the voluntary leaving provision of the MES Act (MCL 421.29(1)(a)), rather than the misconduct provision (MCL 421.29(1)(b)), because it was a more specific provision that applied to claimants with three consecutive absences without contacting the employer in a manner acceptable to them. (R 76.) He ultimately concluded that Wilson was properly disqualified under § 29(1)(a) because the evidence showed he had three consecutive no-call, no-show absences on September 6 through September 8, 2017. (*Id.*)

3. The Appellate Commission affirms the Administrative Law Judge's decision.

The Appellate Commission unanimously affirmed the ALJ. (R 81–83.) It held that Wilson's separation was considered a voluntary leaving "as he was absent without notice for 3 days," and his absence due to incarceration was not attributable to the employer. (R 81.)

D. Circuit court proceedings

Without hearing oral arguments, the Ingham County Circuit Court issued an opinion and order affirming the Appellate Commission. (Wilson App, Part 2.) The circuit court reasoned that the competent, material and substantial evidence, including Wykes's testimony, supported the finding that Wilson was absent three consecutive days without appropriately contacting his supervisor, and that it must therefore affirm the Appellate Commission's decision disqualifying him from unemployment benefits. (*Id.* pp 5–6.) The court noted Wilson's attempts to contact

Meijer on September 5th, but found that those attempts did not comply with Meijer's policy on call-ins. (*Id.*)

Wilson moved for reconsideration, but the court denied his motion because it presented issues that the court already ruled on. (Wilson App, Part 4.)

E. Court of Appeals proceedings

Wilson filed a timely application for leave to appeal the circuit court's decision with the Court of Appeals. The Court of Appeals entered a unanimous order denying leave to appeal. *Wilson v Meijer Great Lakes Ltd Partnership*, unpublished order of the Court of Appeals, entered October 1, 2019 (Docket No. 349078) (Wilson App, Part 1).

STANDARD OF REVIEW

A. This Court reviews lower court decisions on administrative appeals to determine whether the court applied correct legal principles.

Appellate courts review a lower court's decision on an administrative appeal to determine whether the lower court applied correct legal principles and whether the court grossly misapplied the substantial evidence test to the administrative tribunal's factual findings, which essentially constitutes a clearly erroneous standard of review. *Hodge v US Sec Associates, Inc*, 497 Mich 189, 194 (2015); *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424 (2010). A finding is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Dep't of Human Servs v Mason*, 486 Mich 142, 152 (2010), citing *In re Miller*, 433 Mich 331, 337 (1989).

Legal issues preserved for this Court's review are reviewed de novo. *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702 (2018).

B. A circuit court reviews Appellate Commission decisions to determine whether they are consistent with law and supported by the record.

The Constitution sets forth the parameters within which circuit courts review administrative decisions. Circuit courts must determine whether the decisions are authorized by law and, where a hearing is required, whether those decisions are supported by competent, material, and substantial evidence. Const 1963, art 6, § 28, ¶ 1. In conformity with this provision, the MES Act provides that a circuit

court's review is limited to those questions of fact and law made on the record before the administrative law judge and the Appellate Commission and involved in the Commission's final decision. MCL 421.38(1). A circuit court may reverse a final Appellate Commission decision if it is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." *Id.* Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a mere scintilla but less than a preponderance. *Trumble's Rent-L-Center, Inc v Employment Sec Comm*, 197 Mich App 229, 233 (1992).

A reviewing court is not at liberty to substitute its own judgment for an Appellate Commission's decision that is supported with substantial evidence. *Smith v Employment Sec Comm*, 410 Mich 231, 256 (1981). The sole function of the court in reviewing the administrative decision is to determine whether the decision is supported by competent, material, and substantial evidence on the whole record "from which legitimate and supportable inferences were drawn." *Dep't of Comm Health v Risch*, 274 Mich App 365, 375 (2007).

A reviewing court should not invade the fact-finding province of an administrative body by displacing its choice between two reasonably differing views of the evidence. *Goolsby v City of Detroit*, 211 Mich App 214, 220 (1995) (citations omitted). Stated another way, reviewing courts are precluded from reweighing or examining evidence to determine whether the Appellate Commission's decision is objectively correct.

ARGUMENT

I. The lower courts correctly affirmed the Appellate Commission's conclusion that Wilson is disqualified from receiving benefits because he failed to appropriately call in or show up for work for three or more consecutive days.

In this case, both the law and the record evidence support the Appellate Commission's decision that Wilson was properly disqualified from receiving benefits after he failed to report for work or call in for three or more consecutive days. The Appellate Commission properly applied the law to the facts of the case, and the circuit court and Court of Appeals correctly applied its standard of review to affirm that decision and deny leave to appeal, respectively. There is no legal basis for disturbing these decisions.

A. Individuals who have three consecutive absences without properly contacting their employer are considered to have voluntarily left their job and are disqualified from benefits.

An individual is statutorily disqualified from receiving benefits if he "le[aves] work voluntarily without good cause attributable to the employer." MCL 421.29(1)(a). The MES Act states: "An individual who is absent from work for a period of 3 consecutive workdays or more without contacting the employer in a manner acceptable to the employer . . . shall be considered to have voluntarily left work without good cause attributable to the employer." *Id.* Thus, an individual with three or more consecutive no-call, no-show days is disqualified from receiving unemployment benefits.

B. Wilson's employment ended when he failed to report to work or properly contact Meijer for more than three consecutive days.

The record establishes that Wilson was scheduled to work each day between September 3, 2017, and September 8, 2017. (R 34–35.) He was arrested on September 4, 2017, and remained in jail until September 17, 2017. (R 26–28.) As a result of his incarceration, Wilson missed his scheduled work shifts from September 4 through September 8, 2017. (R 20, 22.) It is undisputed that he did not call to report his absences on September 4, 6, 7, and 8, 2017. (R 20, 22, 29). Though he contacted Meijer on September 5, 2017, it was not in a fashion acceptable to Meijer, as required by § 29(1)(a) of the MES Act.

Meijer's policies require team members like Wilson to call in at least sixty minutes before their shift starts to "notify their leadership of an absence." (R 50–51.) Wilson did not do this. The record is clear that on September 5th, Wilson called in the afternoon, several hours after his usual 6:45 a.m. shift start time. (R 19, 25.) Wilson called Meijer's "guard shack," not his supervisor or anyone else in a leadership position as required. (R 20.) And, Wilson merely said that he would not be in that day because of "unusual circumstances." (R 25.) That was the last anyone at Meijer heard from Wilson for a week and a half.

Thus, there is competent, material, and substantial evidence in the record to support the Appellate Commission's conclusion that Wilson failed to report to work without properly contacting Meijer for three or more days. When such a failure occurs, the MES Act says that the individual voluntarily left employment without good cause attributable to their employer and, therefore, the person is disqualified

from receiving unemployment benefits. Because the Appellate Commission's decision is supported by the record and is consistent with law, the circuit court applied correct legal principles in affirming the decision and the Court of Appeals appropriately denied leave to appeal.

C. Wilson's arguments in favor of reversing the decisions in his case are unsupported by the law or the record.

Wilson implores this Court to find him eligible for benefits because he asserts he did not voluntarily leave his job, as he had no control over the reason he was unable to report to work. But his arguments miss the mark. The facts of this case fall squarely within the no-call, no-show provision of § 29(1)(a), and the unambiguous statutory language requires that he be disqualified from receiving unemployment benefits.

1. Wilson overlooks plain and clear statutory language, and asks this Court to rewrite § 29(1)(a)'s no-call, no-show provision.

Wilson asserts that § 29(1)(a) should not be applied in a "strict liability" fashion to always disqualify a person with three or more consecutive no-call, no-shows. (App for Lv, pp 6–13, 16–17.) Rather, he believes that administrative bodies and the courts must consider the reason why a claimant missed work and failed to call in and determine whether the absences were truly within the claimant's control. (*Id.*) But the Legislature has established that this is simply not a part of the analysis when a claimant is gone for three or more consecutive days without contacting their employer.

Wilson's repeated use of the phrase "strict liability" is puzzling because it is a legal term of art that is not applicable to this case. Strict liability concepts are more-often explored in tort or criminal cases, with "strict liability" being defined as legal accountability for an injury "that does not depend on proof or intent to do harm," but rather is "based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule." *Black's Law Dictionary* (11th ed). Those concepts are not at issue here. Rather, the issue is whether Wilson is disqualified for unemployment benefits under the MES Act. On *that* issue, Wilson misreads the plain and relevant text of § 29(1)(a).

When interpreting statutes, the legislature "primary goal . . . is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co*, 492 Mich 503, 515 (2012) (quotation omitted). Words and phrases used "should be accorded [their] plain and ordinary meaning, taking into account the context in which the words are used." *Id.* Here, the statute is clear: § 29(1)(a) states that a person who is absent three consecutive days without appropriate employer contact "*shall* be considered to have voluntarily left work without good cause attributable to the employer." MCL 421.29(1)(a) (emphasis added). Thus, a person with three or more consecutive no-call, no-shows is deemed to have voluntarily left without good cause and is disqualified from benefits. The use of the "shall be considered" language is absolute and leaves no allowance of additional considerations or motivations. There is no other statutorily supported interpretation of this section.

Wilson leans on a different, more general, provision of § 29(1)(a) in support of his argument that the administrative bodies and the lower courts erred in failing to analyze why he was gone for three or more consecutive days without calling-in. (App for Lv, pp 8–11, 14–15, 17.) But that provision is not applicable to this case.

The second sentence in § 29(1)(a) states the general rule in voluntary leaving cases: "An individual who left work *is presumed* to have left work voluntarily without good cause attributable to the employer or employing unit." MCL 421.29(1)(a) (emphasis added). In the very next sentence, however, the Legislature addresses the more specific scenario at issue in this case: where a claimant has three or more consecutive no-call, no-shows. There is no language in the applicable sentence about any presumption. Thus, Wilson is incorrect when he repeatedly asserts that the burden is on a claimant to rebut any presumption or prove that the reason they were gone for three or more consecutive days without calling-in was beyond their control. (App for Lv, pp 1, 8–11, 15, 17–18.)

The fact that the Legislature chose to use two separate, independent sentences (one for general voluntary leaving cases and one for specific no-call, no-show cases) indicates it intended two separate things. Had the Legislature intended to merely create a rebuttable presumption that those with three or more consecutive no-call, no-shows had voluntarily quit, it could have said that such workers "*are presumed* to have voluntarily left work without good cause." Instead, it chose to use the more direct phrase "*shall be considered* to have voluntarily left

without good cause." That choice of words cannot be overlooked. Yet that is what Wilson asks this Court to do in interpreting the MES Act.

Wilson even asserts that "presumed" and "considered" mean the same thing. (App for Lv, p 15.) But if the Legislature really intended for those words to have the same meaning, why would it use different words in consecutive sentences? And, using the definition of "consider" that Wilson asks to Court to apply leads to the following non-sensical reading of § 29(1)(a): "an individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be [reflected on, or carefully or cautiously thought of] to have voluntarily left work without good cause attributable to the employer." MCL 421.29(1)(a), interposing the definition of "consider" offered by Wilson in App for Lv, p 15 from *Webster's Third New International Dictionary, Unabridged Edition* (2002).

Simply put, the plain and clear language of § 29(1)(a) compels the conclusion reached by the ALJ, Appellate Commission, and the circuit court, that Wilson is disqualified from receiving unemployment benefits.

2. The case law Wilson cites is inapplicable and distinguishable.

Wilson asserts that this Court's analysis for voluntary leaving cases established in *Warren v Caro Community Hospital*, 457 Mich 361 (1998), would be dismantled if the reasons for Wilson's absence and whether it was truly voluntary

are not considered. (App for Lv, pp 6–9.) Wilson is incorrect, however, because this case does not require any *Warren* analysis and therefore does nothing to threaten *Warren*.

Warren establishes a two-step analysis of the general voluntary-leaving provision for unemployment benefits discussed in the previous section, which looks at: (1) whether the claimant voluntarily left their position, and (2) whether the leaving was without good cause attributable to the employer. *Warren*, 457 Mich at 366. But *Warren* was decided more than 20 years before the enactment of the no-call, no-show provision, and therefore does not apply here. Indeed, in enacting the no-call, no-show provision, the Legislature took the *Warren* fact-specific analysis out of the equation. Stated another way, the Legislature effectively performed the *Warren* analysis in those specific cases where an individual is gone from work for three or more consecutive days without properly contacting their employer by affirmatively stating that such a claimant *did* leave work voluntarily without good cause attributable to their employer. There is nothing more to analyze. Contrary to Wilson's assertion, the plain text of the no-call, no-show provision fits well within *Warren's* framework.

Wilson also cites to *Thomas v Employment Sec Comm*, 356 Mich 665, 669 (1959) and *Guebara v Muskegon Aluminum Foundry*, unpublished opinion of the Court of Appeals, issued September 27, 1996 (Docket No. 180648) (Wilson App, Part 7), for the proposition that incarcerated individuals should not be disqualified from benefits because their absence is involuntarily due to their being forcibly kept from

work. (App for Lv, pp 10–11, 16.) But both cases were decided before the no-call, no-show provision of § 29(1)(a) was enacted. Thus, those courts did not analyze such a scenario in light of the current statutory language.

Indeed, the *Thomas* Court noted that it was improper for a court to do the very thing Wilson asks this Court to do: overlook the plain language of the MES Act to effectively amend it. *Thomas*, 356 Mich at 669 ("Whether one in claimant's situation ought to be disqualified is a question of policy for the legislature, not a judicial question to be determined by the court.") And in 2011, the Legislature made a policy decision that individuals who are absent three or more days without contacting their employer are disqualified from receiving unemployment benefits. Wilson may disagree with that policy decision, but it is improper for him to ask this Court to ignore the clear statutory language and rewrite the statute.

Wilson also cites to a more recent unpublished decision, *Sheppard v Meijer Great Lakes Limited*, unpublished opinion of the Michigan Court of Appeals, issued December 20, 2012 (Docket No 300681) (Wilson App, Part 6), in support of his contention that the no-call, no-show provision of § 29(1)(a) requires an analysis as to why the individual left his or her job and whether it was voluntary. (App for Lv, pp 7, 10.) *Sheppard*, of course, is not binding on this Court because it is an unpublished decision. MCR 7.215(C)(1). But is also not persuasive because it is distinguishable in a key respect—the Appellate Commission did not analyze the case under the no-call, no-show provision. (Wilson App, Part 6, pp 4–5.) In fact, the Court of Appeals reversed the circuit court in *Sheppard* because of the lack of

analysis of the no-call, no-show provision. (*Id*. p 5.) The *Sheppard* panel also noted the lack of record evidence that the claimant was absent on a workday or that she failed to report to work on a day she was expected to work. (*Id*.) This is not the case here. The record evidence demonstrates that Wilson missed several consecutive days when he was scheduled to work, and the ALJ, the Appellate Commission, and the circuit court properly analyzed the no-call, no-show provision.

In sum, the statutory language in § 29(1)(a) says that individuals who are absent three or more days without proper employer contact are considered to have voluntarily quit without good cause attributable to their employer. Had the Legislature intended this to be anything other than a clear conclusion (such as a rebuttable presumption), it would have said so like it did elsewhere in the section.

3. This Court recently rejected Wilson's call to apply statutes in a particular ideological way.

Wilson contends that the MES Act is a remedial statute and that the no-call, no-show provision of § 29(1)(a) should be liberally construed in favor of finding him eligible for benefits. (App for Lv, pp 11–14.) But this Court recently held that courts should "restrain calls for liberal or strict construction, opting instead for a reasonable construction of all legal texts." *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29 (2018) (internal citations omitted). A reasonable construction is one that is based on the plain language of the statue. As discussed above, the statutory language of § 29(1)(a)'s no-call, no-show provision is unambiguous, and it is clear

Wilson's scenario falls within its ambit. Thus, under a reasonable construction of § 29(1)(a), he is disqualified from unemployment benefits.

Wilson also errs when he argues that any interpretation other than the one he asks for is unfair and will lead to unjust results. (App for Lv, pp 17–18.) But because the language of the no-call, no-show provision is so clear, it does not require a court to construe it or interpret it. Rather, a court must simply apply it to the facts of a given case. Wilson's assertions of unfairness and injustice would be more appropriately addressed to the Legislature than to this Court.

CONCLUSION AND RELIEF REQUESTED

This Court should deny Leonard Wilson's application for leave to appeal because the circuit court applied correct legal principles in affirming the Appellate Commission's decision. And the Court of Appeals acted appropriately in denying leave to appeal. The record supported the decision that Wilson was disqualified from receiving benefits, and that decision was consistent with law.

The Michigan Unemployment Insurance Agency therefore asks this Court to deny Wilson's application for leave to appeal.

Respectfully submitted,

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Dated: December 10, 2019

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Agency-Appellee.
_____/

Supreme Court No. 160530

Court of Appeals No. 349078

Ingham County Circuit Court
No. 18-000711-AE

PROOF OF SERVICE

I certify that on December 10, 2019, I electronically filed the Michigan Unemployment Insurance Agency's Brief in Opposition to Wilson's Application for Leave to Appeal, which sent notification of such filing to the individuals registered on the MiFile System. I further certify that on December 10, 2019, a copy of the above was served on Meijer Great Lakes Limited Partnership, 2929 Walker Avenue, NW, Grand Rapids, MI 49544 by mailing the same to it at its respective address, with the first-class postage fully prepaid.

/s/Judie K. Bridleman
Judie K. Bridleman
Legal Secretary to Rebecca M. Smith,
Assistant Attorney General

Dated: December 10, 2019

STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	**Case Number:**
LEONARD WILSON V MEIJER GREAT LAKES LIMITED PARTNE	160530

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	Brief in Opp to App for Lv to Appeal
CONNECTED FILING	POS re Brief in Opp

2. On 12-10-2019, I served the document(s) described above on:

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12-10-2019
Date

/s/ Rebecca Smith
Signature

Michigan Department of Attorney General

Claimant/Appellant Leonard Wilson's Reply Brief with Appendices, December 28, 2019 Michigan Supreme Court

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MSC No. 160530

Court of Appeals No. 349078

Trial Court No. 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY

Agency-Appellee.

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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Dated: **December 28, 2019**

REPLY BRIEF FOR CLAIMANT-APPELLANT LEONARD WILSON'S APPLICATION FOR LEAVE TO APPEAL AND PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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ARGUMENT

I. THE PLAIN AND CLEAR LANGUAGE OF THE TEXT FAVORS MR. WILSON'S READING OF THE STATUTE.

A. The Plain Meaning of a Sentence is Understood in Context of the Rest of the Statute, Not in Isolation.

According to *Sun Valley Foods Co v Ward*, 470 Mich 230, 236 (2002), a Michigan Supreme Court case that analyzes statutory interpretation, each individual sentence of a statute should be interpreted in the context of the entire statute. The case states, "We interpret those words [of the sentence] in light of their ordinary meaning and their context within the statue and read them harmoniously to give effect to the statute as a whole." *Id*. In its Opposition Brief, the Agency argues that the "shall be considered" language is "absolute," leaving "no allowance of additional considerations or motivations." However, this interpretation is myopic and does not consider the entirety of the statute.

Section 29 of MESA is structured by first providing examples of situations where an employee's behavior is interpreted as a voluntarily leaving without good cause attributable to the employer and then providing exceptions to these examples that allow the claimant to receive benefits. The second half the statute, which explains the exceptions to the voluntary leaving situations, calls for a deeper look into the circumstances of the nature of separation. The no call, no show provision is found in the list of scenarios that results in a claimant's assumed voluntary leaving.

However, this is not the end of the analysis and is certainly not "absolute." Instead, the statute calls for a deeper review of the circumstances surrounding the nature of separation to determine whether the claimant, despite having been initially categorized as voluntarily leaving, should still receive benefits. This is consistent with the statute as a whole, which is intended to provide relief from hardship caused by involuntary unemployment and deserves the narrow

disqualification standard that this Court and other courts consistently give. *Noblit v Marmon Group-Midwest Foundry Div*, 386 Mich 652, 654 (1972). The disqualification provisions of MESA should be narrowly construed in favor of the claimant. *Chrysler Corp v DeVine*, 92 Mich. App. 555, 558 (1979).

Reading the no call, no show provision in isolation from the rest of the statute not only leads to an inappropriate and absurd result, but such a reading also cuts against clear case law on rules of statutory interpretation and how this Court has reviewed voluntary quit cases.

B. The Agency incorrectly handles applicable voluntary quit case law.

The Agency incorrectly states that the *Warren* test is not relevant in this case. The *Warren* test is applicable when questions regarding the voluntariness of a claimant's separation arise, such as in Wilson's case. The *Warren* test, as correctly noted by the Agency, lays out a two-part analysis. Under the first prong, a court must determine whether the claimant "voluntarily left her position." This depends on the "particular facts and circumstances of the case." If, after analyzing the situation, the court determines that the claimant did not voluntarily leave, the "inquiry ends, and she is entitled to unemployment benefits." However, if the court determines that a claimant has voluntarily left, the second prong must be analyzed. Under the second prong a court determines whether the leaving was "without good cause attributable to the employer."

Under the no call, no show provision, a claimant is presumed to have voluntarily left if she is absent for work for three consecutive days without appropriately contacting her employer. Section 29 (1)(a) lays this scenario side by side with other circumstances where a claimant seems to have voluntarily quit, and the court is instructed to review the facts surrounding the quit to determine if it was voluntary. Courts have found while investigating the facts surrounding the

quit that there are many reasons that establish that a quit was not voluntary when using the *Warren* test. *See Simpson v MBS Commercial Printers, Inc,* Unpublished Opinion of the Bay Circuit Court, Issued August 25, 2000 (Docket No. 99-3129-AE-B) (Appendix 1) (holding claimant did not leave voluntarily after analyzing employer's abusive behavior toward claimant); *Lakeshore Pub Academy v Scribner,* Unpublished Opinion of the Oceana Circuit Court, Issued May 10, 2004, (Docket No. 03-004110-AE) (Appendix 2) (finding claimant did not leave voluntarily after analyzing abusive workplace conditions); *Voorhees v Allegiance Health,* Unpublished Opinion of the Jackson County Circuit Court, Issued March 29, 2013 (Docket No. 12-3123-AE) (Appendix 3) (finding claimant left employment with good cause attributable to the employer because the employer created a hostile work environment); *Spence v The Dakota Corp,* Unpublished Opinion of the Isabella Circuit Court, Issued October 30, 2000 (Docket No. 00-1666-AE) (Appendix 4) (finding claimant did not leave voluntarily after being asked to break trucking law); *Hibbard v. Tuff Kote Dinol Rustproof*, Unpublished Opinion of the Muskegon Circuit Court (Docket No. 82-17148 AE) (Appendix 5) (finding claimant did not voluntarily leave because he was asked to break the law by short cutting a rust-proofing job). For example, in *Simpson v. MBS Commercial Printers, Inc.*, a claimant notified his employer that he would not come back into work due to death threats from his employer. The ALJ analyzed the facts and circumstances surrounding what seemed like a voluntary leaving and determined that "Employees should not have to labor under the threat of murder." *Simpson*, unpub op at 2. Further, in *Hibbard v. Tuff Kote Dinol Rustprof*, a claimant was asked to incorrectly apply a de-rusting process to a customer's automobile. The claimant refused to do so and resigned. However, the ALJ did not simply take the claimant's resignation at face value. Instead, the ALJ analyzed the facts and circumstances surrounding the separation and determined that in situations

where a claimant is asked to do something illegal, there has not been a voluntary leaving. *Hibbard*, unpub op at 3. Because these other areas where the no call, no show provision is located review the facts and circumstances to determine the voluntariness of a separation, it follows that this analysis likewise applies to this newly added provision.

It would be illogical to apply a different standard to the no call, no show provision, which creates the same questions regarding the voluntariness of a claimant's separation from employment. As when a claimant has a personal emergency and the court finds that their leaving was not voluntarily, so too a claimant may have an emergency and be absent from work, unable to contact their employer for three days. The court must inquire into the circumstances surrounding a no call, no show case using the *Warren* test to determine whether a claimant's leaving was truly voluntary. Otherwise, the court is acting contrary to established law.

C. The Legislature must be explicit when writing statutes in derogation of the common law, like the voluntary quit inquiry.

A long-established canon of statutory interpretation states that the legislature did not intended to displace the common law unless they were explicit. "[A] statute in derogation of the common law will not be construed to abrogate the common law by implication, but if there is any doubt, the statute is to be given the effect that makes the least change in the common law." *Velez v Tuma*, 492 Mich 1, 17 (2012) (internal citation omitted). In other words, "statutes will not be interpreted as changing the common law unless they effect the change with clarity." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, p 318 (2012).

A two-pronged test has been developed by this court in *Warren* which clearly lays out a basic inquiry for voluntary quit cases. The first question, whether or not a claimant left their

work voluntarily, adhered to basic tenants of fairness as envisioned by the purpose of MESA: to provide temporary assistance to those Michigan workers who found themselves out of work.

Because the text of the statute does not direct the court to stray from how this Court has consistently reviewed voluntary quit cases—in derogation of the common law test in *Warren* — the provision should be narrowly construed. As this Court stated, "[w]here there is doubt regarding the meaning of such a statute, it is to be 'given the effect which makes the least rather than the most change in the common law.'" *Nation v W.D.E. Electric Co*, 454 Mich 489, 494 (1997), citing *Energetics Ltd v Whitmill,* 442 Mich 38, 51 (1993).

Applying this fundamental canon of statutory interpretation here, a reading of the no call, no show provision that supports a rebuttable presumption and does not impose strict liability follows the test laid out in *Warren*. In contrast, a reading that imposes strict liability on claimants in a way that unjustly runs afoul of the basic purpose of MESA displaces the test in *Warren*. Without clear indication from the legislature that they intended to displace the common law, the no call, no show provision should be read in harmony with this Court's precedent and allow an inquiry into the voluntariness of a claimant's separation.

D. Because *McQueer* is a worker's compensation statute, not an unemployment benefits statute, it's dicta does not overrule the call to interpret MESA fairly as laid out in *Tomei*.

In arguing that this Court should not narrowly construe disqualification provisions to effectuate the remedial purpose of MESA, the Agency cites a footnote in *McQueer v. Perfect Fence Co.* Resp 17-18. *McQueer* involves the Worker's Disability Compensation Act, not the Michigan Employment Security Act. Thus, it is not binding on this Court's interpretation of the no call, no show provision.

Further, even if this Court were to adopt the language quoted from *McQueer*, the most "reasonable construction" of this statute would be to follow the precedent established in *Tomei*. *See also Park v Appeal Bd of Mich Employment Security Comm*, 355 Mich 103, 123 (1959) (holding that the MESA "should be so interpreted as to effectuate that remedial purpose implicit in its enactment"); *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 418 (1997) (holding that the MESA's disqualification provisions should be interpreted narrowly to "[result] in the allowance of the claims rather than their denial"). And even more, a strict liability approach to disqualify claimants is improper under either reading.

CONCLUSION

For the above-stated reasons, Claimant Leonard Wilson respectfully requests that this Court grant leave to appeal pursuant to MCR 7.305(B), or remand the matter to the Court of Appeals for consideration, pursuant to MCR 7.305(H)(1).

Respectfully Submitted,

University of Michigan Law School
Workers' Rights Clinic

Dated: December 28, 2019

By: */s/ Rachael Kohl*
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STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MSC No. 160530

Court of Appeals No. 349078

Trial Court No. 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY

Agency-Appellee.

PROOF OF SERVICE

I certify that a copy of the forgoing brief for Claimant-Appellant Leonard Wilson was served upon:

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this **December 27, 2019** by mailing a copy at the above-listed addresses, first class postage prepaid, in Ann Arbor, Michigan.

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Appendix 1:
Simpson v MBS Commercial Printers, Inc, Unpublished Opinion of the Bay Circuit Court, Issued August 25, 2000 (Docket No. 99-3129-AE-B)

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

DARREN H. SIMPSON,

Claimant

Appeal Docket No. B98-00846-148280W

Social Security No. [redacted]

MBS COMMERCIAL PRINTERS, INC.,

Employer

DECISION ON REMAND

This case originally came before the Board of Review as a result of a May 1, 1998, appeal from a March 30, 1998, decision. On June 30, 1998, the Board issued an order dismissing for lack of jurisdiction as the appeal had not been made within the thirty [30] day statutory limitation. Thereafter, the claimant submitted a timely July 16, 1998, application for rehearing.

The rehearing application contained affidavits from the claimant's attorney and two other individuals as well as supporting documentation which clearly indicated the appeal was made within thirty [30] days. In response, the Board issued an August 31, 1998, order allowing rehearing and re-asserted jurisdiction over this matter. After reviewing the record on rehearing we found the Referee's decision should be affirmed.

Upon receiving the Board's January 28, 1999, decision on rehearing, the claimant timely appealed to the circuit court. By means of a February 22, 2000, order, the circuit court has remanded this matter to the Board of Review for a new decision. Accordingly, we have reviewed this matter and again find the Referee's decision should be affirmed. Our reasons are as follows.

The claimant began working for the employer in 1991. He was employed as a general production worker on a full-time basis and earned $12.50 per hour. His last day of work was November 14, 1997. On that day he voluntarily left his employment. The question to be resolved is whether his leaving was with good cause attributable to the employer. See Section 29(1)(a) of the Michigan Employment Security [MES] Act.

According to the claimant, he left his employment because he had been threatened by one of the owners, Mr. Leslie. The claimant indicated that at approximately 1:30 p.m. on November 14, 1997, he was approached by Mr. Leslie. He/Mr. Leslie purportedly gave the claimant a difficult time and returned him to another assignment. Thereafter, approximately an hour later he purportedly approached the claimant and again gave him a difficult time. The claimant asserts that during this second exchange Mr. Leslie threatened him saying, "Don't f--k with me -- I'll kill you -- I'll throw you in a ditch!"

Notably, although the alleged threat was made at approximately 2:30 p.m., the claimant remained at the workplace until 5:00 p.m., an hour after Mr. Leslie departed.

November 14, 1997, was a Friday. Over the weekend, the claimant decided to sever the employment relationship. To that end, he called the workplace and left a message indicating he was quitting.

When questioned about the matter, Mr. Leslie acknowledged that there had indeed been a heated exchange between himself and the claimant on November 14, 1997. He conceded that during this exchange he had used profanity. However, he denied having ever threatened the claimant.

When the issue is voluntary leaving, the claimant bears the burden of proof. See Cooper v University of Michigan, 100 Mich App 99 (1980). In order to meet that burden, the claimant must establish he had good cause attributable to the employer for his departure. See Section 29(1)(a) of the MES Act. Good cause exists when the circumstances surrounding the departure would have prompted a reasonable, average and otherwise qualified worker to leave. See Carswell v Share House, Inc., 151 Mich App 392 (1986).

In the instant matter, the claimant asserts that the reason he left was because he feared Mr. Leslie. If this was so, we fail to understand why he remained in the workplace on Friday, November 14, 1997. In our estimation, if he had genuinely feared Mr. Leslie he would have immediately departed. Since he did not, we are left to conclude he was not threatened.

While the claimant was not threatened, he was sworn at. While such behavior should be avoided, we cannot find that in this one instance it provides a basis for a finding of good cause. Accordingly, we find the claimant disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a).

For the reasons stated above, the Referee's March 30, 1998, decision is affirmed.

For the reasons stated above, the claimant is disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a).

Lester A. Owczarski, Member

Kathleen Markman, Chair

JULIE ANN PETRIK (MEMBER), DISSENTING AS FOLLOWS:

I respectfully disagree with the Board majority. My reasons are as follows.

By the owner's own admission, on the claimant's last day he and the claimant had an argument which the owner initiated. While the owner asserts he only swore at the claimant during the argument and made no threats, the claimant indicated the employer had said, "Don't fuck with me -- I'll kill you -- I'll throw you in a ditch!" In the face of this conflicting testimony, the Referee made no specific credibility finding. I, however, conclude the claimant's testimony is credible and find that his testimony accurately reflects the facts.

While the claimant had been able to ignore the earlier physical and verbal assaults, this particular threat differed from the others in that it was a death threat. Moreover, given the fact that the owner owned a number of guns, the claimant believed he could and would make good on the alleged threat. Therefore, the claimant filed a police report. He also notified the employer he would be leaving his employment.

Notably, there had been difficulties between the claimant and the owner in the past. The owner had yelled at him and the owner's brother had pushed him. These problems typically arose when the employer was experiencing financial difficulties. According to the employer, in November of 1997, money was tight. In fact, the claimant who was the only non-owner employee had recently returned from a layoff and was told he would again be laid off in December.

The fact that the claimant worked the balance of his final shift does not mean the claimant was in no danger nor diminishes the credibility of the claimant. The claimant simply chose the prudent course. Instead of provoking the employer in an environment that he controlled, the claimant opted to notify the owner later. This gave the owner an opportunity to cool down and allowed the claimant to place some physical distance between them. This was the prudent course and in no way diminishes the seriousness of the employer's threat.

Good cause exists when the circumstances which prompted the claimant's departure would have caused an average, reasonable and otherwise qualified worker to leave. See Carswell v Share House, Inc., 151 Mich App 392 (1986). The employer made a death threat. Employees should not have to labor under the threat of murder. Accordingly, I would reverse the Referee's decision. As the Board majority has chosen to do otherwise, I must dissent.

Julie Ann Petrik, Member

MAILED AT LANSING, MICHIGAN APR 26 2000

This decision will become final unless a written request for rehearing or appeal to the appropriate circuit court is RECEIVED on or before MAY 26 2000

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.

14280

A. D. No. B98-00846-148280W
S. S. No. [redacted]
B. O. No. 33
Employer No. 1288554

STATE OF MICHIGAN
CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
BAY COUNTY

DARREN H. SIMPSON,
Appellant,

Court No. 99-3129-AE-B

v

HON. LAWRENCE M. BIELAWSKI

MBS COMMERCIAL PRINTERS, INC,
and STATE OF MICHIGAN,
UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES,
Appellees.
_____/

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OPINION AND ORDER REVERSING THE DECISION OF THE MESC BOARD OF REVIEW WHICH FOUND APPELLANT/CLAIMANT DISQUALIFIED FOR BENEFITS

STATE OF MICHIGAN

IN THE EIGHTEENTH CIRCUIT COURT FOR THE COUNTY OF BAY

DARREN H. SIMPSON,

Appellant,

v. File no. 99-3129-AE-B

MBS COMMERCIAL PRINTERS, INC., and STATE OF MICHIGAN UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,

Appellant.

STATE OF MICHIGAN
COUNTY OF BAY
ATTESTED
A TRUE COPY
LINDA L. NOBER
CLERK OF CIRCUIT COURT
Deputy

OPINION AND ORDER REVERSING THE DECISION OF THE MESC BOARD OF REVIEW WHICH FOUND APPELLANT/CLAIMANT DISQUALIFIED FOR BENEFITS

RECITAL

This case originally came before the Court as a result of appellant/claimant's appeal from a January 28, 1999 decision of the MESC Board of Review ["the Board"] which affirmed the Referee's decision that appellant/claimant was disqualified from receiving benefits under the voluntary leaving provision of the Michigan Employment Security Act ["MESA"], Section 29(1)(a). On February 22, 2000, this Court issued it's *Opinion and Order Remanding this Matter to the Board of Review* which required the Board to make specific findings of fact in this matter and to issue a new Decision, accordingly. Following said remand, the Board issued a

decision dated April 26, 2000 whereby the Board again affirmed the Referee's decision finding that appellant/claimant was disqualified from receiving benefits. This is the Court's Opinion and Order ***REVERSING*** the Board's decision and finding that appellant/claimant is ***NOT*** disqualified from benefits under the voluntary leaving provision of the MESA, Section 29(1)(a).

FACTUAL BACKGROUND

The facts involved in the case have already be thoroughly discussed by this Court in its February 22, 2000 *Opinion and Order Remanding this Matter to the Board of Review*. As a result, and in the interest of brevity, the Court hereby adopts and incorporates herein the "Factual Background" portion of its February 22, 2000 Opinion, a copy of which is attached hereto and made a part hereof.

DISCUSSION

As previously stated, in its April 26, 2000 *Decision on Remand*, the Board affirmed the Referee's decision that appellant/claimant was disqualified from benefits because the appellant/claimant's leaving was ***not*** for good cause attributable to the employer as required by Section 29(1)(a) of the MESA. In support of this conclusion, the Board stated as follows:

> "Notably, although the alleged [death] threat was made [by the employer, Mr. Leslie] at approximately 2:30 p.m., the claimant remained at the workplace until 5:00 p.m., an hour after Mr. Leslie departed.
>
> "November 14, 1997 [i.e., the date of the alleged threat], was a Friday. Over the weekend, the claimant decided to sever the employment relationship. To that end, he called the workplace and left a message indicating he was quitting."
>
> * * *
>
> "In the instant matter, the claimant asserts that the reason he left was because he feared Mr. Leslie. If this is so, we fail to understand why he remained in the workplace on Friday, November 14, 1997. In our estimation, if he had genuinely feared Mr. Leslie, he would have immediately departed. Since he did not, we are left to conclude he was not

threatened.

> "While the claimant was not threatened, he was sworn at. While such behavior should be avoided, we cannot find that in this one instance it provides a basis for a finding of good cause. Accordingly, we find the claimant disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a)." [R 10].

This Court has reviewed the entire record on appeal, as well as the applicable court rules, statutes and case law involved in this matter. As a result thereof, this Court finds and holds that the Board's decision is not supported by competent, material and substantial evidence upon the record as a whole. This Court is therefore ***REVERSING*** the Board's decision and, in so doing, finds and holds that appellant/claimant is ***not*** disqualified from benefits under the MESA. This conclusion is based upon the exact same reasons stated in the Board's dissenting opinion. As a result, and in the interest of brevity and judicial economy, this Court hereby adopts in full and incorporates herein the dissenting opinion of Board Member Julie Ann Petrik which is found at pages 11-12 of the record on appeal.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Board's decision affirming the Referee's finding that appellant/claimant is disqualified from benefits under the MESA be, and the same hereby is, ***REVERSED.***

Dated: AUG. 25, 2000

HON. LAWRENCE M. BIELAWSKI
Circuit Court Judge

Appendix 2:
Lakeshore Pub Academy v Scribner, Unpublished Opinion of the Oceana Circuit Court, Issued May 10, 2004 (Docket No. 03-004110-AE)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OCEANA

LAKESHORE PUBLIC ACADEMY,

Employer/Appellant,

File No. 03-004110-AE

v

PATRICIA A. SCRIBNER, and State of Michigan, Department of Consumer and Industry Services, Bureau of Workers' & Unemployment Compensation, Formerly MESC and Unemployment Agency,

OPINION

Claimant/Bureau/Appellees.

Lakeshore Public Academy ("Academy") appeals the decision of the Employment Security Board of Review which granted Patricia Scribner unemployment benefits under MCL 421.29(1)(a). This decision is affirmed.

I.

The testimony at the administrative hearing showed that on November 22, 2003, Steve Hamilton, a teacher at the Academy, and his wife, confronted Scribner regarding her discipline of Hamilton's step-son during the previous day. In response to questions from the administrative law judge ("ALJ"), Scribner testified that the following occurred:

> Q. All right: So a co-worker, Mr. Hamilton, did or said what?
>
> A. He came into my classroom—we call it a wing. And was upset with me. Pointed his finger in my face. When I tried to—tried to so some—to say, please don't do that, he came even closer, pointed a finger at my face, glared into my eyes and said, I can point my finger at whoever I want to point my finger at.
>
> Q. All right. What—what was your—how did you feel when he did this?
>
> A. Totally intimidated.
>
> Q. All right. What did—now, where—this occurred where, in your classroom?

A. In the classroom.

Q. At approximately what time?

A. It was a—probably a little bit after 8:00 because the students were coming in to the room.

Q. Okay. Was anyone with him?

A. Yes.

Q. Who?

A. His wife.

Q. What did his wife do?

A. She grabbed him by the arm or took him by the arm and pulled him away from me. [Tr, pp 8-9]

Shortly thereafter, Scribner attempted to report this incident by leaving a voice mail for Michelle Baskin, the Administrative Facilitator for the Academy. Baskin was unable to promptly respond to this call, because she was away from work for medical reasons.

Scribner followed up the voice mail message with another telephone call to Baskin which she was able to answer. Scribner recalled the conversation as follows:

Q. What did you tell her?

A. I told her about the finger-pointing incident. And I told her I—I just couldn't work under those conditions.

Q. What was her response?

A. She asked me to think about it. [Tr, p 10]

Baskin recalled that the incident between Scribner and Hamilton caused Scribner to express an intention to quit her employment:

Q. Yes, what did she say to you in the phone conversation when she finally reached you on November 22?

A. That—she did say that she was going to quit.

Q. All right. Did she say why she was going to quit?

A. Because—because of Mr. Hamilton. [Tr, p 17]

The Academy has a written policy prohibiting threatening behavior toward staff members, and it directs the administrative staff regarding the handling of these incidents:

> The board of directors believes that a staff member should be able to work in an environment free of threatening speech or actions. Threatening behavior consists (sic) any words or deeds that intimidate a staff member or cause anxiety concerning his or her physical and/or psychological well-being is strictly forbidden.
>
> Any student, parent, visitor, staff member or agent of this board who is found to have threatened a member of the staff will be subject to discipline or reported to the authorities.
>
> The administrative facilitator shall implement guidelines whereby students and employees understand this policy and appropriate procedures are established for prompt and effective action on any reported incidents.

Baskin testified that she promptly reviewed Scribner's complaint with Hamilton, who gave a dramatically different version of what occurred during this incident. Baskin was unable to reconcile the statements given by Scribner and Hamilton; thus, she concluded that no disciplinary action was warranted against Hamilton.

Baskin did not inform Scribner of the meeting with Hamilton nor did Baskin explain to Scribner why no formal action was going to be taken as a result of her complaint. Baskin was unable to provide an explanation to the ALJ regarding the Academy's failure to communicate its decision and rationale for not taking any formal action:

> Q. Well I guess the thing that confuses me here is that if you did meet with Mr. Hamilton and made a decision that there was such a dichotomy between the statements of the two and without any supporting statements from anybody else that you could not take any disciplinary action, why you didn't feel the necessity to communicate that to Ms. Scribner so that she understood why you were taking disciplinary action.
>
> A. [No verbal response]
>
> Q. Can you explain that to me?
>
> A. No. [Tr, p 24]

On November 26, 2002, Baskin sent an e-mail message to Scribner regarding the need for a meeting "to facilitate a smooth and dignified separation." A few weeks later, on January 6, 2003, Scribner submitted her formal letter of resignation to the Academy. In this letter, Scribner wished the Academy well, praised Baskin for her work and leadership, and concluded by stating that "it is time" to leave the Academy. Scribner's last day of work was January 17, 2003, which coincided with the end of the school semester.

II.

MCLA 421.29(1)(a) provides that a person who voluntarily leaves her employment without good cause attributable to the employer is ineligible for unemployment benefits. The ALJ concluded that Scribner quit her job for good cause attributable to her employer, and the Academy argues that this decision is contrary to law and not supported by competent, material, and substantial evidence.

The Academy claims that the ALJ's decision violates the legal principle established by Schultz v Oakland County, 187 Mich App 96; 466 NW2d 374 (1991). I disagree. In Schultz, a deputy sheriff, who was on medical leave due to stress, submitted a letter of resignation during his leave period, and two days later, he attempted to withdraw his resignation which was not allowed by his employer. The MESC denied the deputy's claim for unemployment compensation, because it concluded that he voluntarily quit his job without good cause attributable to his employer.

On appeal, the legal issue focused on whether the deputy voluntarily resigned, because he testified that his letter of resignation was the product of medication and stress. In this case, Scribner makes no claim that her resignation was involuntary. Unlike the Schultz case, the issue here focuses on whether the resignation was a product of good cause attributable to the employer.

Alternatively, the Academy claims that the ALJ erred by using Scribner's dissatisfaction with the Academy's decision to not discipline Hamilton as a basis to conclude that Scribner left her job for good cause attributable to her employer. "Good cause" may be personal to the employee, provided it is based on a situation that could lead a reasonable person to quit her employment. Carswell v Share House,Inc., 151 Mich App 392; 390 NW2d 252 (1986)

The Academy contends that the ALJ improperly supplanted the role of the Academy to determine what, if any, discipline should be meted out to its employees. However, the ALJ did not rule that the failure of an employer to discipline an employee in response to a co-worker's complaint automatically supplies good cause to quit a job. The ALJ's decision turned on the failure of the Academy to complete the normal and expected handling of an employee's grievance by communicating to the employee the results of the investigation and what, if any, action would be taken in response to the complaint. In other words, the manner in which the Academy handled the complaint, not the decision made by Baskin in response to the complaint, led to the ALJ's decision.

This conclusion, when coupled with the undisputed testimony of Scribner regarding her co-worker's threatening behavior, caused the ALJ to find good cause attributable to the employer.

Lastly, the Academy argues that the ALJ's conclusion that Scribner left her job for good cause attributable to her employer is not supported by competent, material, and substantial evidence. Appellate review of the findings of fact by an administrative tribunal is limited, and it is ordinarily not proper for the reviewing court to substitute its view of the facts for that of the tribunal. Saber v Capitol Reproductions, Inc., 28 Mich App 462; 184 NW2d 518 (1970). The factual findings of the tribunal should be upheld if supported by substantial evidence, and the term "substantial evidence" only requires more than a mere scintilla of evidence but less than the preponderance of this evidence. Becotte v Gwinn Schools, 192 Mich App 682; 481 NW2d 728 (1992).

The Academy challenges the ALJ's findings of fact that Scribner's testimony concerning Hamilton's threatening behavior was "unrebutted" and that Baskin had "not disciplined" him. The Academy correctly points out that Baskin testified that she promptly investigated the incident and that she found that Hamilton disputed Scribner's version of the incident, and Baskin could not reconcile the versions of the two employees to make any firm conclusion regarding what happened.

However, Scribner was the only person who testified at the hearing that had personal knowledge of what happened on November 22, 2002. Baskin's information comes only second-hand from the parties to the inicident, and no explanation is apparent why the Academy did not call Hamilton, who still worked at the school, as a witness. Considering this circumstance, the ALJ's finding that Scribner's testimony was "unrebutted" is supported by substantial evidence.

The Academy contends that the ALJ erroneously determined that the Academy failed to implement its rule against threatening behavior by not disciplining Hamilton. The decision to discipline or not discipline Hamilton is not the point. The point is that on the record available to the ALJ, the Academy did not complete the process of handling Scribner's complaint by communicating to her that it was investigated and what, if any, action would be taken to respond to the complaint. These facts led the ALJ to conclude that from Scribner's perspective, she may reasonably conclude that a co-worker could violate the rule against threatening behavior, and the Academy was unwilling or unable to do anything about it.

In sum, the ALJ's decision is not contrary to the law, and, given my limited role in reviewing his findings of fact, I must conclude that there is sufficient evidence in the record to support his decision. Accordingly, the decision of the ALJ is affirmed.

May 10, 2004

Anthony A. Monton (P26051)
Circuit Judge

Appendix 3:
Voorhees v Allegiance Health, Unpublished Opinion of the Jackson County Circuit Court, Issued March 29, 2013 (Docket No. 12-3123-AE)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JENNIFER M. VOORHEES,

Claimant/Appellant,

Case No. 12-3123-AE

Hon. John G. McBain

v

ALLEGIANCE HEALTH,

Employer/Appellee

STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY,

Appellee

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OPINION FOLLOWING APPEAL

Claimant in this case, who is a resident of Jackson County, has timely filed an appeal of the decision of the Michigan Compensation Appellate Commission dated May 25, 2012. This Court has proper jurisdiction to hear her claim of appeal under MCL 421.38.

Background

The following is a statement of facts determined by this Court after reviewing the record as a whole. The Claimant, Jennifer Voorhees, began working for Allegiance Health on January 29, 2008, as a full time cashier. On April 4, 2011, the hospital had an

internal disaster drill. Employees are not allowed to leave during these disaster drills. On this particular day Mrs. Voorhees needed to leave work at her normal time due to childcare issues. Her children were on spring break from school at this time. Her husband was at home with the children and could not leave for work until his wife came home from her job. She notified her supervisor that she had childcare issues and needed to know when she might be allowed to leave. She was informed by her supervisor, Terry Shaughnessy, that she needed to make other arrangements for childcare. Mrs. Voorhees called her husband to tell him that she didn't know what time she would be released and they needed to find someone else to care for the children. After speaking with his wife, Mr. Voorhees decided to call Mrs. Shaughnessy himself. Mrs. Voorhees was not in the room during the time of the phone call. After learning that her husband had called Mrs. Shaughnessy she apologized to her and said that she did not know why he called and that she could not control him.

On April 5, 2011, Mrs. Voorhees returned to work. She was informed by Mrs. Shaughnessy around 1pm that day that everyone in the office had been told of the phone call by her husband. She went on to further tell Mrs. Voorhees that she thought her husband was abusive and that he drinks. On April 7, 2011, Mrs. Voorhees called to set up an appointment with the human resources department to speak to someone about the comments her supervisor had made about her husband. She notified her supervisor of the appointment time. Her meeting with HR took place on April 11, 2012. She was told that the supervisor's comments were inappropriate and they would look into it.

On April 12, 2011, Mrs. Voorhees was called into the office by the department head, Jennifer Zysk, and her supervisor, Terry Shaughnessy. At this time she was given corrective action and a final written warning. She was given this final warning for not properly acknowledging a patient when she approached them; for the incident on April 4th for not being a team worker and lacking compassion; for removing her personal belongings from her work area; and for security guards talking outside her window. She was also talked to about being tardy to work on dates that occurred between November and December of 2010. Mrs. Voorhees was told to complete 3 sessions of employee assistance counseling. She was able to complete one session during the remainder of her employment.

Mrs. Voorhees states her doctor took her off work for three days due to the stress of this situation.

On May 9, 2011, Mrs. Voorhees was again called into the office and written up for lack of compassion. Her supervisor reports that she was also tardy on this day. She was told by her supervisor and department head that as homework, she needed to think of a way to better approach her supervisor to ask for help to become a better employee. On May 10, 2011, Mrs. Voorhees quit her job.

Before April 4, 2011, when the emergency disaster drill took place, Mrs. Voorhees had never been formally disciplined.

Procedural History

On May 13, 2011, Mrs. Voorhees filed for unemployment benefits. A determination was issued on May 31, 2011. On July 18, 2011, a redetermination was issued disqualifying her from benefits. Mrs. Voorhees appealed the redetermination and a hearing was conducted before Administrative Law Judge Sewell. ALJ Sewell found she had established through credible testimony that she acted as "[a] reasonable, average and otherwise qualified person in giving up her employment." He further stated she "has established by evidence that she was harassed after the incident involving the emergency drill situation on April 4, 2011."

Allegiance Health appealed the decision of the ALJ and the matter was heard before the Michigan Compensation Appellate Commission (MCAC). The MCAC reversed the decision of the ALJ in an opinion dated May 24, 2012, stating that "a reasonable, average, and otherwise qualified worker would not give up on employment at the first sign of disciplinary action."

Mrs. Voorhees timely filed her claim of appeal from the decision of the MCAC on October 1, 2012.

Law

MCL 421.38(1) provides that the Circuit Court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

Under the Michigan Employment Security Act an individual is disqualified from receiving benefits if she left work voluntarily or without good cause attributable to the employer. MCL 421.29(1)(a). The Michigan Court of Appeals established in *Carswell v Share House Inc.* that good cause is determined when "an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment. 151 Mich App 392, 396 (1986).

Analysis

After reviewing the record and hearing oral arguments on this matter, this Court finds the Plaintiff has established her burden of proving that she left her employment due to good cause attributable to her employer. Mrs. Voorhees had been employed by Allegiance Health for over three years prior to the incidents surrounding the emergency disaster drill without receiving any written warnings. After complaining about her supervisor's behavior to the Human Resources Department she was given a final written notice of corrective action. She was written up for six different things, on two separate occasions after the incident occurred.

This Court finds Mrs. Voorhees has established that she was harassed after the incident occurred. She had actually been taken off work by her doctor for the amount of stress she was under due to this situation. We further find that a reasonable, average, and otherwise worker would feel compelled to leave their employment after this type of treatment. The decision of the MCAC is reversed and the claimant's unemployment benefits are to be restored.

IT IS SO ORDERED this 29th day of March, 2013.

HONORABLE JOHN G. MCBAIN
CIRCUIT COURT JUDGE

Certificate of Service:

I hereby certify that a copy of this order was sent to the parties via U.S. mail this 29th day of March, 2013.

Jenny Stone, Court Officer

Appendix 4:
Spence v The Dakota Corp, Unpublished Opinion of the Isabella Circuit Court, Issued October 30, 2000 (Docket No. 00-1666-AE)

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE COUNTY OF ISABELLA

Edwin Spence,
Appellant,

v

File No: 00-1666-AE

The Dakota Corporation,
and Unemployment Agency,
Michigan Department of Consumer
& Industry Services,
Appellees.

Amy L. Meilink
Attorney for Appellant

Martin J. Vittands
Attorney for Appellees

OPINION AND ORDER ON APPEAL

Appellant, Edward Spence, was twice disqualified from receiving unemployment benefits because it was determined that he voluntarily left work without good cause attributable to the employer. . . [MCL 421.29(1)(a)]. Claimant requested a referee hearing. The original fact finder found that Mr. Spence should not have been disqualified for benefits for voluntarily quitting his job. At the second rehearing, the Board reversed this decision, finding that Mr. Spence had failed to prove that "he acted as a reasonable, average and otherwise qualified worker." Claimant appeals the Board's decision to the circuit court. This Court has reviewed the briefs, transcripts, and attachments in the file.

The issue presented in this appeal is whether the Employment Security Board of Review erred in finding that Appellant did not have good cause attributable to his employer for leaving work voluntarily.

Facts

Mr. Spence began working for Appellee in 1996 as a truck driver. Over the course of his employment Mr. Spence was required to drive a minimum of seven hours between Grand Haven, Michigan and Windsor, Ontario delivering five loads of sand in four days. In addition to that seven hour commute, Mr. Spence commuted two and one-half hours one way from home to work and spent nearly four hours loading and unloading the sand. Providing that Mr. Spence was not subject to traffic and loading delays his minimum working day would be approximately twelve to fifteen hours. Because Mr. Spence was required to complete five trips in four days he would return to Grand Haven, reload his truck, and travel right back to Windsor with little or no sleep. This around-the-clock schedule not only violated Michigan Department of Transportation regulations, but also proved to be physically taxing on Mr. Spence and resulted in him being hospitalized on two occasions.

Additionally, to avoid being fined, Mr. Spence felt compelled to falsify his travel logs in order to show that he was in compliance with transportation regulations. Mr. Spence made Appellee aware that the schedule they required of him was both taxing, illegal and compromised the health and safety of the general public. Mr. Spence also informed Appellee that another colleague was falsifying his logs. Appellee refused to alter the schedules and essentially disregarded Mr. Spence's concerns. Mr. Spence attempted to terminate his employment on previous occasions, but finally terminated his employment with Appellee on December 5, 1998, after previously returning at the urging of Appellee and with the understanding that he would not be required to work the previously required hours. Mr. Spence finally left his employment after Appellee failed to alter his schedule. Mr. Spence subsequently applied for unemployment benefits and he filed a complaint against Appellee with the United States Department of Transportation. On July 6, 1999, the USDOT issued a statement of charges and fined Appellee $2100 for among other citations, five violations of false report of records of duty status.

Standard of Review

Judicial review of administrative decisions is limited to determining if the lower decision was authorized by law, and in cases where a hearing was required, whether the same are supported by competent, material and substantial evidence on the whole record. A reviewing court should reverse an administrative decision when: a) it violates the constitution or a statute; b) it exceeds statutory

authority or the jurisdiction of the agency; c) it is made upon unlawful procedures resulting in material prejudice to a party; d) it is not supported by competent, material and substantial evidence on the whole record; e) it is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; or f) it is affected by other substantial and material error of law. MCL 24. 306(1).

Mr. Spence challenges the Boards decision under MCL 24.306 (1)(d) and (f) arguing that the administrative decision is affected by substantial and material error of law, in addition to not being supported by competent, material and substantial evidence on the whole record.

Parties Positions

Appellant argues that he was required to work unreasonable and unlawful hours that compromised his health and public safety. Appellee did not deny that on several occasions Mr. Spence drew his attention to the fact that he was violating the law. Appellee admits that it did nothing to resolve Mr. Spence's complaints. Additionally, the Department of Transportation concurred with Mr. Spence that Appellee was in violation of the law and the agency's regulations. When eventually confronted by USDOT regarding the discrepancies in logs, Appellee Dakota Corporation responded "I can't babysit these drivers, they want to make money." Based on the DOT findings it is unquestionable that Appellee violated the law. Mr. Spence challenges the Boards decision under MCL 24.306 (1)(d) and (f) arguing that the administrative decision is affected by substantial and material error of law, in addition to not being supported by competent, material and substantial evidence on the whole record.

Appellee, Unemployment Agency, concedes that an employee whose employer knowingly requires employees to engage in unlawful activity would generally have good cause for quitting. However, the Board of Review in this case found that there was a lack of evidence that the employer knew claimant was falsifying his logs, encouraged him to do so, or otherwise expected him to drive unlawfully. The claimant conceded that he didn't know if his employer knew he was keeping logs improperly and that his employer insisted that he was driving lawfully. There is no testimony from claimant that the employer deliberately required claimant to operate unlawfully, or provided good cause for claimant's quitting. Second, the employer testified that he expected claimant to make four trips in four days, and believed that five trips in four days would still be within DOT regulations. There is no testimony by the employer that infers he expected claimant to drive unlawfully, and in fact claimant decided to do the fifth load on his own. Additionally, claimant said he had driven in violation of the law since 1996 so for over three years claimant did not feel compelled to quit. Additionally, after discovered evidence (the outcome of the DOT investigation) should not form a basis for unemployment agency decisions. Children's Hospital of Michigan v Craddock, unpublished opinion per curiam of the Court of Appeals, decided May 19, 1998.

Analysis

Upon a complete reading of the transcript this Court finds that Appellant informed his employer on numerous occasions that they were forcing him to drive illegally and that he was only able to maintain an appearance of legality by falsifying his logs. Appellant also informed the employer that he was aware that his co-employee was falsifying his logs and at times their logs if compared would show that each was driving (only one truck shared between the two). Each time the employee tried to explain the problems the employee insisted they were legal, refused to review

the documentation the employee tried to present, and told the driver that each of them was on their own if they got stopped and caught falsifying the logs. Although the employer may not have told the employee to falsify the logs they should have been aware that the 5 required trips to Canada and back could not be legally done in 3 or 4 days as they required of the employees. This Court finds that the employee acted as a "reasonable, average, and otherwise qualified worker" in trying to maintain the job to pay bills to the cost of hospitalization twice. Eventually he was able to verify that the hours he was being asked to work were illegal while at the same time the employer was praising his co-worker for making the five trips in 3 days and suggesting that the employee needed to work around the clock also. Employee eventually realized that he was harming his health working in an illegal manner and if he were to get caught he would be individually responsible for the fine - likely losing the money he was working so hard for. Thus, the employee meets his burden of demonstrating that he acted as "reasonable, average, and otherwise qualified worker." The ruling of the administrative agency is not supported by competent, material and substantial evidence on the whole record.

IT IS HEREBY ORDERED AND ADJUDGED that the decision on Rehearing should be set aside and appellant granted unemployment benefits.

October 30, 2000

Hon. Scott J. Newcombe
Sitting by Assignment as
Isabella County Trial Court Judge

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the attorney of record of all parties to the above cause at their respective business address on Nov. 7 to 2000

☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other

Signature Wendy M. Lodick

Appendix 5:
Hibbard v. Tuff Kote Dinol Rustproof, Unpublished Opinion of the Muskegon Circuit Court (Docket No. 82-17148 AE)

A.D. No. B82-13562-85191W
S.S. No. [redacted]
B.O. No. 25

S T A T E O F M I C H I G A N

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

THOMAS HIBBARD,

Appellant,

-vs- File 82-17148-AE

MICHIGAN EMPLOYMENT SECURITY COMMISSION
and TUFF KOTE DINOL RUSTPROOF,

Appellees.
_____/

THOMAS J. O'TOOLE, JR. (P33286)
Attorney for Appellant

FRANK J. KELLEY, Attorney General
of the State of Michigan
By: JACK BLUMENKOPF (P24042)
Assistant Attorney General
Attorneys for Appellee
Michigan Employment Security Commission

OPINION AND ORDER

Appellant, Thomas Hibbard, appeals a decision of the Michigan Employment Security Commission Board of Review which affirmed a referee's decision that appellant was disqualified from receiving unemployment compensation benefits because he left work voluntarily without good cause attributable to the employer or employing unit, MCLA 421.69(2)(a), MSA 17.569(19)(2)(a). The referee found that Hibbard had voluntarily terminated his employment

because his company advertised to the public a "two-step" rust-proofing process which involved the application of both a penetrant and a sealant; however, the management of the firm often instructed claimant to apply only the penetrant or only the sealant to an automobile. Claimant felt that he was "cheating the public" and not doing the rust-proofing jobs properly or as advertised, and that numerous customer complaints resulted from this practice. After protesting to management about this improper and inadequate procedure, claimant resigned. After making these findings of fact, the referee ruled as a matter of law that the facts did not constitute good cause attributable to the employer or employing unit.

In reviewing decisions made by the referee or Board of Review, the Court may review questions of fact and law on the record made before the referee and the Board of Review; however, the Court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material and substantial evidence on the whole record. MCLA 421.38(1), MSA 17.540(1); Chrysler Corp v. Sellers, 105 Mich App 715, 720 (1981). The Court finds that the referee's findings of fact are supported by competent, material and substantial evidence on the whole record, and those findings of fact are not disturbed. However, the Court finds that the ultimate decision based on those facts is contrary to law, and the decision of the referee and a majority of the Board of Review denying appellant unemployment benefits is reversed.

The Court holds as a matter of law that an employee whose work duties include activities which require the employee to violate federal, state or local laws has demonstrated "good cause attributable to the employer or employing unit" as that term is employed in MCLA 421.69(2)(a), MSA 17.569(19)(2)(a). The employer's occasional practice of requiring claimant to utilize a one-step rust proofing process when the employer advertised to the public a two-step rust proofing process compelled claimant to participate in practices which were in clear violation of the Michigan Consumer Protection Act, MCLA 445.901 et seq, MSA 19.418(1) et seq. In the absence of any Michigan appellate cases on point, the Court is persuaded by the reasoning of the Commonwealth Court of Pennsylvania in Zinman v. Unemployment Compensation Board of Review, 8 Pa Cmwlth 649, 305 A2d 380 (1973), in which the Court held that a legal duty to obey laws may constitute appropriate circumstances for an employee to voluntarily terminate employment and still qualify for unemployment compensation benefits. The Court finds that, in the context of the referee's findings of fact, an average employee acting in good faith would have had good cause to resign from the job. Specifically, the Court finds that, in the context of the referee's findings of fact, claimant acted in good faith and as a reasonable person in terminating his employment rather than continue in an illegal practice. Claimant had good cause to resign, and this good cause was directly attributable to the employer.

The decision of the referee and Employment Security Board of Review being contrary to law, the decision denying claimant unemployment compensation benefits is reversed.

Dated this 17 day of May, 1983.

James M. Graves, Jr.

James M. Graves, Jr., Circuit Judge

STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	**Case Number:**
LEONARD WILSON V MEIJER GREAT LAKES LIMITED PARTNE	160530

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	Wilson MSC Reply App for Leave FINAL and POS
CONNECTED FILING	Wilson Reply Appendix

2. On 12-28-2019, I served the document(s) described above on:

Recipient	Address	Type
Rachael Kohl University of Michigan Unemployment Insurance Clinic	rekohl@umich.edu	e-Serve
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with MiFILE and its contents are true to the best of my information, knowledge, and belief.

12-28-2019
Date

/s/ Rachael Kohl
Signature

University of Michigan Unemployment Insurance Clinic

Amicus Brief of the Sugar Law Center for Economic & Social Justice, January 3, 2020 Michigan Supreme Court

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON
Claimant-Appellant

v.

MSC No. 160530
Court of Appeals No. 349078
Trial Court No.18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Agency-Appellee

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

BRIEF OF AMICUS CURIAE ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT'S APPLICATION FOR LEAVE

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and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Agency-Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

The Sugar Law Center for Economic and Social Justice ("Sugar Law") asks this Court, pursuant to MCR 7.212(H), for leave to file a brief as *amicus curiae* in support of the Claimant-Appellant's application for leave. In support of its motion, Sugar Law Center states the following:

1. The Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) is a national nonprofit law center based in Detroit, Michigan in the United States of America. The Sugar Law Center's central mission includes the promotion of economic and social rights as human rights and civil rights within the legal system. The Sugar Law Center provides legal support to workers and labor organizations on projects to ensure workers' rights to a fair and decent place to work free of discrimination, to protect workers

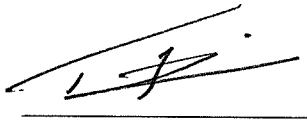
from wage theft, to improve benefits to displaced workers, to ensure their right to organize, and on other projects towards a fuller realization of the economic and social rights of working people.

2. The proposed Amicus Curiae Brief on behalf of the Sugar Law Center is submitted along with this motion.

RELIEF REQUESTED

WHEREFORE, the Sugar Law Center for Economic and Social Justice asks this Court to grant its motion and allow it to file the proposed Amicus Curiae Brief in Support of the Claimant-Appellant's Application for Leave.

Respectfully submitted,



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Dated: January 2, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

LEONARD WILSON
Claimant-Appellant

MSC No. 160530
Court of Appeals No. 349078
Trial Court No.18-000711-AE

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
Agency-Appellee

BRIEF OF AMICUS CURIAE ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT'S APPLICATION FOR LEAVE

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STATUTES AND RULES INVOLVED

MCL 421.2 Declaration of public policy; findings

(1) 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 or her 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.

(2) The legislature finds that from time to time high levels of unemployment have resulted in the exhaustion of the funds in this state's account of the unemployment trust fund, has required advances or loans to the state from the federal account of the unemployment trust fund, and has caused the imposition of lawful penalty taxes and solvency taxes to repay those advances and the interest on those advances. The financing and payment of the outstanding principal amount heretofore or hereafter advanced or loaned to this state from the federal account of the unemployment trust fund and the interest on those loans, if any, the funding of unemployment compensation benefits, and the financing and funding of this state's account in the unemployment trust fund including, without limitation, the funding of sufficient fund balances in

the unemployment trust fund, are an essential governmental function and public purpose of this state. The legislature further finds that the issuance of bonds by the Michigan finance authority or other issuer to finance the foregoing payments and to avoid or reduce the imposition of penalty taxes and solvency taxes will further and facilitate an essential governmental function and public purpose of this state that will encourage the development of industry and commerce, foster economic growth, provide employment opportunities for the citizens and residents of this state and further other economic development and activities in this state, and in general promote the public health and general welfare of the people of this state.

MCL 421.29 Disqualification from benefits

Sec. 29. (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:

(a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job. However, if any of the following conditions is met, the leaving does not disqualify the individual:

(i) The individual has an established benefit year in effect and during that benefit year leaves unsuitable work within 60 days after the beginning of that work. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(ii) The individual is the spouse of a full-time member of the United States armed forces, and the leaving is due to the military duty reassignment of that member of the United States armed forces to a different geographic location. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(iii) The individual is concurrently working part-time for an employer or employing unit and for another employer or employing unit and voluntarily leaves the part-time work while continuing work with the other employer. The portion of the benefits paid in accordance with this subparagraph that would otherwise be charged to the experience account of the part-time employer that the individual left shall not be charged to the account of that employer, but shall be charged instead to the nonchargeable benefits account.

(b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.

(c) Failed without good cause to apply diligently for available suitable work after receiving notice from the unemployment agency of the availability of that work or failed to apply for work with employers that could reasonably be expected to have suitable work available.

(d) Failed without good cause while unemployed to report to the individual's former employer or employing unit within a reasonable time after that employer or employing unit provided notice of the availability of an interview concerning available suitable work with the former employer or employing unit.

(e) Failed without good cause to accept suitable work offered to the individual or to return to the individual's customary self-employment, if any, when directed by the employment office or the unemployment agency. An employer that receives a monetary determination under section 32 may notify the unemployment agency regarding the availability of suitable work with the employer on the monetary determination or other form provided by the unemployment agency. Upon receipt of the notice of the availability of suitable work, the unemployment agency shall notify the claimant of the availability of suitable work. Until 1 year after the effective date of the amendatory act that added this sentence, an individual is considered to have refused an offer of suitable work if the prospective employer requires as a condition of the offer a drug test that is subject to the same terms and conditions as a drug test administered under subdivision (m), and the employer withdraws the conditional offer after either of the following:

(i) The individual tests positive for a controlled substance and lacks a valid, documented prescription, as defined in section 17708 of the public health code, 1978 PA 368, MCL 333.17708, for the controlled substance issued to the individual by his or her treating physician.

(ii) The individual refuses without good cause to submit to the drug test.

(f) Lost his or her job due to absence from work resulting from a violation of law for which the individual was convicted and sentenced to jail or prison. This subdivision does not apply if conviction of an individual results in a sentence to county jail under conditions of day parole as provided in 1962 PA 60, MCL 801.251 to 801.258, or if the conviction was for a traffic violation that resulted in an absence of less than 10 consecutive work days from the individual's place of employment.

(g) Is discharged, whether or not the discharge is subsequently reduced to a disciplinary layoff or suspension, for participation in either of the following:

(i) A strike or other concerted action in violation of an applicable collective bargaining agreement that results in curtailment of work or restriction of or interference with production.

(ii) A wildcat strike or other concerted action not authorized by the individual's recognized bargaining representative.

(h) Was discharged for an act of assault and battery connected with the individual's work.

(i) Was discharged for theft connected with the individual's work.

(j) Was discharged for willful destruction of property connected with the individual's work.

(k) Committed a theft after receiving notice of a layoff or discharge, but before the effective date of the layoff or discharge, resulting in loss or damage to the employer who would otherwise be chargeable for the benefits, regardless of whether the individual qualified for the benefits before the theft.

(l) Was employed by a temporary help firm, which as used in this section means an employer whose primary business is to provide a client with the temporary services of 1 or more individuals under contract with the employer, to perform services for a client of that firm if each of the following conditions is met:

(i) The temporary help firm provided the employee with a written notice before the employee began performing services for the client stating in substance both of the following:

(A) That within 7 days after completing services for a client of the temporary help firm, the employee is under a duty to notify the temporary help firm of the completion of those services.

(B) That a failure to provide the temporary help firm with notice of the employee's completion of services pursuant to sub- subparagraph (A) constitutes a voluntary quit that will affect the employee's eligibility for unemployment compensation should the employee seek unemployment compensation following completion of those services.

(ii) The employee did not provide the temporary help firm with notice that the employee had completed his or her services for the client within 7 days after completion of his or her services for the client.

(m) Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner. If the worker disputes the result of the testing, and if a generally accepted confirmatory test has not been administered on the same sample previously tested, then a generally accepted confirmatory test shall be administered on that sample. If the confirmatory test also indicates a positive result for the presence of a controlled substance, the worker who is discharged as a result of the test result will be disqualified under this subdivision. A report by a drug testing facility showing a positive result for the presence of a controlled substance is conclusive unless there is substantial evidence to the contrary. As used in this subdivision and subdivision (e):

(i) “Controlled substance” means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

(ii) “Drug test” means a test designed to detect the illegal use of a controlled substance.

(iii) “Nondiscriminatory manner” means administered impartially and objectively in accordance with a collective bargaining agreement, rule, policy, a verbal or written notice, or a labor-management contract.

(n) Theft from the employer that resulted in the employee's conviction, within 2 years of the date of the discharge, of theft or a lesser included offense.

STATEMENT OF QUESTIONS ADDRESSED

I. This Court has found that "'voluntary' as used in Section 29(1)(a) must connote a decision based upon a choice between alternatives which ordinary men would find reasonable – not mere acquiescence to a result imposed by physical and economic facts utterly beyond the individual's control." *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201, 216 (1961). Sometimes an individual cannot attend work due to circumstances outside their control. Should their absence from work be considered "voluntary" quit under this Court's definition?

Amici's answer:	No.
Wilson-Appellant's answer:	No.
Agency-Appellee's answer:	Yes.
Employer-Appellee's answer:	Yes.

II. Strict liability is a disfavored, rarely-imposed standard that is foreign to the social safety net benefits context. In his ruling, the ALJ imposed a strict liability standard when he ruled that a claimant who has a three day "no call, no show" is disqualified from unemployment insurance benefits regardless of the reason for not contacting their employer. Is the ALJ's imposition of a strict liability standard in the unemployment benefits context an appropriate use of the strict liability standard?

Amici's answer:	No.
Wilson-Appellant's answer:	No.
Agency-Appellee's answer:	Yes.
Employer-Appellee's answer:	Yes.

III. Administrative law judges are afforded great deference with regards to findings of fact, but they do not possess common law powers; their authority is limited to the application of statutory provisions and administrative rules. Here, the ALJ created new law by imposing a strict liability standard on the "no call, no show" provision." Did the ALJ exceed his authority in doing so?

Amici's answer:	Yes.
Wilson-Appellant's answer:	Yes.
Agency-Appellee's answer:	No.
Employer-Appellee's answer:	No.

STATEMENT OF INTEREST[1]

The Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) is a national nonprofit law center based in Detroit, Michigan in the United States of America. The Sugar Law Center's central mission includes the promotion of economic and social rights as human rights and civil rights within the legal system. The Sugar Law Center provides legal support to workers and labor organizations on projects to ensure workers' rights to a fair and decent place to work free of discrimination, to protect workers from wage theft, to improve benefits to displaced and unemployed workers, to ensure workers' right to organize, and on other projects towards a fuller realization of the economic and social rights of working people. In the interests of the rights of all workers and particularly the unemployed and underemployed with whom we work, we join this amicus brief together with other interested organizations based on the belief that the outcome of this case will have a significant impact on the rights of our past, present and future clients.

Tony D. Paris
Lead Attorney

[1] Students from the Workers' Rights Clinic at the University of Michigan Law School, who were not involved in writing the Wilson Application for Leave to this Court, collaborated with the filing attorneys at the Sugar Law Center for Economic and Social Justice in drafting this amicus brief. The Clinic did not make any monetary contribution to fund the preparation or submission of the brief.

INTRODUCTION

In a novel interpretation of the "no call, no show" provision of the Michigan Employment Security Act ("MESA" or "Act"), the Administrative Law Judge ("ALJ") denied unemployment insurance benefits to Leonard Wilson based on his inability to contact his employer while being detained by the state. In doing so, the ALJ transformed a legislative amendment designed to shift the burden of proof from workers to employers in a subset of unemployment cases to a strict scrutiny standard that would wrongfully deny benefits to countless future claimants if not corrected. Claimants who are involved in serious car accidents, experience complications from surgery, or are unable to call their employer for any number of reasons for three consecutive workdays will be denied benefits under the ALJ's strict liability standard. This result is not only unjust – falling on involuntarily unemployed workers during some of the hardest times of their lives – it is contrary to the clear intent of the legislature as expressed in the legislature's declaration of public policy.

> 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 or her family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life.

MCL 421.2. For these reasons, this Court should grant Mr. Wilson's application for leave.

PROCEDURAL HISTORY

ALJ Douglas Wahl found Mr. Wilson disqualified for benefits on June 1, 2018 using a strict liability approached to the MESA. The Michigan Compensation Appellate Commission affirmed the ALJ's decision to deny Mr. Wilson unemployment benefits on September 11, 2018. The Ingham County Circuit Court issued an order affirming this decision on April 12, 2019. Mr. Wilson filed, pro se, a timely motion for reconsideration on May 3, 2019. The Ingham County

Circuit Court issued an order denying the motion and affirming its prior order and opinion on May 6, 2019. Mr. Wilson then sought leave to appeal to the Court of Appeals, which the Court of Appeals denied on October 3, 2019. Mr. Wilson filed an application for leave to bring this matter before the Supreme Court on November 12, 2019.

STANDARD OF REVIEW

The Supreme Court reviews the Circuit Court's legal conclusions *de novo* and factual findings for clear error. *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 177 (2019). The central issue in this appeal is whether the "no call, no show" provision contained in MCL 421.29 is properly considered a strict liability provision. This is a matter of statutory interpretation. Questions of statutory interpretation are considered questions of law. *McCahan v Brennan,* 492 Mich 730, 736 (2012). Therefore, this Court should review the circuit court's application of MCL 421.29 *de novo*.

ARGUMENT

I. Adopting a strict liability interpretation of the "no call, no show" amendment would be contradictory to existing applications of the strict liability standard and the language of the Act.

A. Imposing a strict liability standard to disqualify benefit recipients would be an outlier compared to other applications of strict liability.

"Statutes creating strict liability regarding all their elements are not favored." *People v Quinn*, 440 Mich 178, 187 (1992). In Michigan, strict liability is a rarely-imposed mental state requirement in both the civil and criminal contexts. In civil actions, strict liability is traditionally applied to cases involving trespass by livestock or involving abnormally dangerous activities. 3 Restatement Torts, 2d. Additionally, sellers of products may be held strictly liable for physical

harms caused by use of their products to the user or consumer. 2 Restatement Torts, 2d, §402A-B.

Courts universally limit strict liability in statutory application. In the criminal setting, the Supreme Court of the United States stated in *Morissette* that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v United States*, 342 US 246, 250; 72 S Ct 240; 96 L Ed 288 (1952). Intent forms the basis of the *mens rea* requirement that is an essential element of nearly all crimes. For this reason, strict liability offenses in the criminal context are rare outside regulatory offenses.[2] The exception for regulatory offenses comes from the expansion of the administrative state and are meant to empower the state's regulatory apparatus to enforce social order for the general good. See generally *id.* at 255-56. Common examples of regulatory offenses include:

> (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community.

Id. at 262, n.20. In Michigan, examples of non-public welfare strict liability criminal offenses include statutes criminalizing sex between adults and children under a certain age and non-payment of child support. MCL 750.520b; MCL 750.165.

Imposing a strict liability requirement in the unemployment benefits context would be entirely outside the scope of previous uses of strict liability. An employee who commits a three-day "no call, no show" is not injuring the person or property of another, nor are they engaged in any abnormally dangerous activity. These exceptions to the ordinary culpability standards in tort are aimed increasing the diligence of would-be tortfeasors and compensating their victims. 3

[2] These regulatory offenses are commonly referred to as "public welfare offenses".

Restatement Torts, 2d, § 520, cmt. g. The extreme remedy of strict liability is uncalled for in the benefits disqualification context. Imposing a strict liability standard would make an abnormally dangerous mountain out of a "no call, no show" molehill.

The "no call, no show" provision is also unlike the uses of strict liability in the criminal context. It is not a comparable situation to child sex crimes or failing to provide child support. Neither is the "no call, no show" provision a regulatory offense designed to promote social order and enforce a broader regulatory scheme. Analogizing the "no call, no show" presumption that a worker voluntarily left work to regulations that criminalize the sale of adulterated food and drugs would undermine the reason that the *mens rea* requirement is relaxed for regulatory offenses. In the food and drug context, the purpose is to "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Morissette*, 342 US at 254. Workers who fail to contact their employer when they miss work are not in that position. Accordingly, there is no basis upon which a court should assume that the legislature created a strict liability disqualification without clearly expressing so in the statute.

Moreover, there are very good reasons to think that strict liability is entirely inappropriate in the social welfare benefits context. Unemployment insurance is part of the social safety net created by the legislature to support its constituents during some of the most trying times of their lives. While claimants may sometimes need to meet strict income or other need-based requirements to be qualified for such programs, it does not ever seem to be the case that a strict liability standard has been imposed on disqualification provisions such as the voluntary quit provision. It is one thing to require Medicare claimants to be at least 65 years old or for other benefits claimants to have an income below the federal poverty line. But it is another thing entirely

to deny a claimant unemployment benefits they would otherwise be entitled to on the basis of a strict liability construction of a "voluntary" quit requirement.

B. Acts of the legislature should not be construed to create a strict liability standard when the legislature does not clearly intend to create one.

Courts are an inappropriate venue for establishing a strict liability standard and should only do so in rare instances. Here, it is helpful to look to how courts construct criminal statutes to determine if the "no call, no show" provision should be properly read as imposing strict liability. In cases where a criminal statute is not codifying a common law offense and it omits the elements of knowledge or intent, Michigan courts and the Supreme Court of the United States both look to the intent of the legislature to determine if the statute should be construed as imposing strict liability. See *People v Quinn*, 440 Mich 178, 186-90 (1992).

The mere use of the term "voluntarily" in the "no call, no show" provision belies an element of intent, cutting against a strict liability interpretation. Michigan law provides that words and phrases in statutes should be "understood according to the common and approved usage of language" unless such words and phrases have acquired a "peculiar and appropriate meaning in the law." MCL 8.3a. This rule of construction is to be used "unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3.

In the case of MESA, there is no reason to think that the phrase "voluntary quit" has any peculiar legal meaning outside of its ordinary construction. To "voluntarily quit" one's job appears to mean just that, to leave employment on one's own "unrestrained, volitional, freely chosen, or wilful [sic] action." *Tomei v General Motors Corp*, 194 Mich App 180, 187 (1992) (citing *Clarke v North Detroit Gen Hosp*, 179 Mich App 511, 515-16 (1989), aff'd 437 Mich 280, 287 (1991)). Here, the lower courts acted in contravention of the legislature's clear intent to liberally provide

benefits to those facing involuntary unemployment through no fault of their own. Instead, the ALJ imposed a rarely-used strict liability standard to an unusual context – acting on judicial fiat rather than applying the democratically enacted law.

C. Application of a strict liability standard to the voluntary quit requirement fails to give meaning to all the terms of the statue by erasing the meaning of the term "voluntary."

When Michigan courts engage in statutory interpretation "effect must be given, if possible, to every word, sentence, and section… so as to produce, if possible, a harmonious and consistent enactment as a whole." *Dussia v Merman*, 386 Mich 244, 248 (1971) (quoting *City of Grand Rapids v Crocker*, 219 Mich 178, 182-83 (1922). Here, the provision at issue states:

> Except as provided in subsection (5), an individual is disqualified from benefits if he or she: (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. . .

MCL 421.29.

As an initial matter, a strict liability interpretation of the "no call, no show" provision would conflict with this court's previous interpretations of "voluntary quit" as it is used in MESA. In *Copper Range Co*, the court adopted the meaning of "voluntary quit" as stated by the Superior Court of Pennsylvania, quoting: When we say, "he left work voluntarily," we commonly mean, "he left of his own motion, he was not discharged." *Copper Range Co v Mich Unemployment Compensation Comm*, 320 Mich 460, 469 (1948) (quoting *MacFarland v Unemployment Bd*, 45 A.2d 423, 425 (Pa Super Ct 1946)). The legislature's use of the word "voluntary" in the

unemployment context is clear, "[i]t connotes a choice between alternatives that ordinary people would find reasonable, and has been defined as unrestrained, volitional, freely chosen, or wilful [sic] action." *Tomei*, 194 Mich App at 187.

When the state arrests someone and holds them in a jail cell, nothing in that interaction is voluntary for the criminal defendant. An arrest in a criminal case is inherently involuntary and could never be considered "unrestrained, volitional, freely chosen, or wilful action." *Id.* The same is true for benefit claimants who are in serious car accidents, have an unforeseen medical emergency, or are themselves victims of violent crimes. In each of these cases, it is easy to imagine a reasonable, conscientious employee failing to call in to work on three consecutive occasions in a manner amenable to their employer. But under the ALJ's strict liability interpretation, all of these claimants would be disqualified from benefits despite their failure to call resulting from no fault of their own.

Statutes "should be construed to prevent absurdity, hardship, injustice, or prejudice to the public interest." *Franges v General Motors Corp*, 404 Mich 589, 612 (1979). But imposing a strict liability standard on this provision does the opposite. A strict liability standard leaves no room for claimants to rebut the presumption of voluntariness, insuring that many claimants who lost their jobs through no fault of their own are found not entitled to benefits. Interpreting a provision of the Act in this fashion only serves to kick claimants while they are already down.

But even if we did not have these earlier interpretations to guide us, a strict liability construction would not follow from the canons of statutory construction that are used in Michigan. To understanding the meaning of "voluntary quit" as it is used in the "no call, no show" provision, we must look to the whole of the statute and to its surrounding provisions. Only the constructions

of "voluntary quit" that would result in a harmonious reading of the statute are plausible constructions.

Under a holistic reading of the entire MESA, a strict liability interpretation could not be farther from a harmonious reading of the statute. To determine this, one need look no further than the purpose of MESA, as it has been interpreted time and again by this court. "The MESA was enacted primarily for persons involuntarily unemployed. Its purpose is to lighten the burden of economic security through no fault of their own." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 417 (1997) (citing *Kalamazoo Tank and Silo Co v Unemployment Compensation Comm*, 324 Mich 101, 107 (1949)). See also *Paschke v Retool Indus*, 455 Mich 502, 510 (1994); *Noblit v Marmon Group-Midwest Foundry Division*, 386 Mich 652, 654 (1972); and *Bolles v Appeal Bd of the Mich Employment Security Comm*, 361 Mich 378, 382 (1960). Imposing a strict liability denial of benefits to unemployed individuals who, through no fault of their own, failed to call in to their employer on three consecutive work days, is inapposite to the well-established purpose of the act. Rather, such individuals, who lose their employment due to serious misfortune or unforeseen consequences of actions unrelated to their employment, are precisely those to whom MESA promises support during their lowest economic times.

II. Adopting a strict liability interpretation of the "no call, no show" provision would place an insurmountable burden on claimants facing difficult life situations beyond their control.

A. Other states with similar "no call, no show" provisions do not apply a strict liability standard because of the burden it places on claimants.

Before the enactment of the "no call, no show provision," Michigan treated cases like Mr. Wilson's under a misconduct standard. See, e.g., *Wickey v Appeal Bd of Michigan Employment Security Comm*, 369 Mich 487, 503-04 (1963); *Thomas v Employment Security Comm*, 356 Mich

665, 669-70 (1959). This amendment merely shifts the analysis of these kinds of absences to a voluntary quit standard. Across the nation, different states consider cases like Mr. Wilson's under both voluntary quit and misconduct standards and – regardless of the form of analysis they use – they routinely find in favor of claimants.

1.Voluntary Quit

Numerous states have found that missing work due to incarceration should not be considered a voluntary quit. In understanding what constitutes a voluntary quit, the Iowa Supreme Court found that "voluntary quit as a matter of law requires a volitional act on the part of the employee. We do not think that incarceration, in and of itself, can ever be considered 'volitional' or 'voluntary.' Indeed, incarceration is perhaps the ultimate nonvolitional act." *Irving v Employment Appeal Bd*, 883 NW2d 179, 209 (Iowa 2016) ("there is no substantial support in the record to show that her absence from the workplace due to her incarceration was a voluntary quit."). Consequently, the court ruled that "incarceration in and itself does not establish a voluntary quit." *Id.* at 209.

Florida holds a similar interpretation. In *Parker v Dep't of Labor & Employment Security*, 440 So.2d 438, 439 (Fla Dist Ct App, 1983), Parker was arrested on a felony charge and, similarly to Mr. Wilson, had no funds to obtain release on bail. The Florida Court of Appeals found that "[t]here was, of course, nothing voluntary about Parker's inability to go to work during the 26-day period" of his incarceration. *Id.* Parker was subsequently granted unemployment benefits. See also *Moore v Swisher Mower & Machine Co*, 49 SW3d 731 (Mo Ct App 2001) (where the Missouri Court of Appeals found an employee who was arrested and jailed on a charge of assault did not leave work voluntarily); *Magma Copper Co, San Manuel Division v Arizona Dep't of Economic Security*, 625 P.2d 935 (Ariz Ct App 1981) ("That appellee's last absence was beyond his control

due to incarceration and that appellee was, therefore eligible for unemployment benefits."); and *Shoennagel v La Office of Employment Security*, 413 So.2d 652 (La Ct App 1982) (where the Court of Appeal of Louisiana found that a claimant who was arrested and unable to make bond did not voluntarily quit his job).

While the policies of these states serve only as persuasive authority, they demonstrate that the interpretation of the term "voluntary" in the context of incarceration not a controversial one – and this Court agrees with its sister states regarding what constitute a voluntary quit. In *Mich. Employment Sec. Comm'n v. Appeal Bd. of the Mich. Employment Sec. Comm'n*, 256 Mich. 665, 667-69 (1959), the court held that a claimant who lost his job for an absence from work due to a driving without a license did not voluntarily leave work. As this Court stated:

> The voluntary assumption of a risk which an employee knows may, but he trusts and assumes will not, keep him from work is not the voluntary leaving of his work. **Doing an act, even though voluntarily, which results, contrary to the doer's hopes, wishes and intent, in his being kept forcibly from his work is not the same as voluntarily leaving his work.**

Id. at 469 (emphasis added). (See also *Sullivan v. Appeal Bd. of the Mich. Employment Sec. Comm'n*, 358 Mich. 338 (1960) (holding that a claimant who was incarcerated for public drunkenness similarly did not voluntarily leave work).

An action is only voluntary if it is volitional, and incarceration can hardly be considered a volitional act. In fact, this Court has already defined the term "voluntary" in *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201 (1961). As held by the Court in Lyons, the term "'voluntary' as used in Section 29(1)(a) must connote a decision based upon a choice between alternatives which ordinary men would find reasonable – not mere acquiescence to a result imposed by physical and economic facts utterly beyond the individual's control." *Id.* at 216. In other words, voluntariness means that a claimant is not forced to leave her job because of reasons

outside of her control. A voluntary quit can only occur where a claimant has two "reasonable" options to choose from and chooses, on her own motion, to leave her job. If a claimant is found to have "left her position involuntarily, the inquiry ends and she is entitled to unemployment compensation." *Warren v Caro Community Hosp*, 457 Mich 361, 366-67 (1998).

This Court should look to the example of these other states and agree that it is a logical contradiction to call situations like Mr. Wilson's – where a claimant lost their job due to involuntary incarceration – a voluntary quit. There was no voluntary action undertaken by Wilson to not come into work. His arrest was not his voluntary choice. Therefore, his separation cannot be considered a voluntary quit. Consequently, Mr. Wilson and those claimants similarly situated should not be considered disqualified from receiving unemployment benefits.

2. Misconduct

Other states have examined employee absences through the lens of misconduct. They, too, routinely interpret their statutes to the benefit of claimants.

The Nevada Supreme Court found that incarceration did not constitute disqualifying misconduct because the absence was not in "willful violation or disregard" of an employment policy. *Kurtz v State Employment Sec Division*, No. 60352, 2013 WL 5743736, at *2 (Nev Oct. 17, 2013). In the absence of intent to harm the employer's interests, the absence from work due to incarceration should merely be treated as a violation of company policy, and not disqualifying misconduct. *Id.* Courts in Arkansas and Missouri have come to a similar conclusion that only absences that are within a claimant's control should be considered potentially disqualifying misconduct. See *K-Brooke Enterprises v Unemployment Compensation Bd of Review*, No. 208 C.D. 2017, 2017 WL 5474510, at *2 (Pa Commw Ct Nov. 15, 2017); *Ford v Labor & Indus Relations Comm of Missouri*, 841 S.W.2d 255 (Mo Ct App 1992).

In the calculus of determining whether being incarcerated and missing work is a disqualifying conduct, courts in other states place an emphasis on the ability of the claimant to influence his or her situation. For example, some states note when claimants who could have contacted their superiors chose not to. The Minnesota Court of Appeals held that a claimant was disqualified from benefits when the claimant did not notify his employer that he was in jail even though he had a shift that evening and had access to a phone. The court found that this action, or lack thereof, to not notify his employer of his incarceration constituted the misconduct that disqualified him from benefits. *Johnson v Dunham Express Corp*, No. A09-1649, 2010 WL 1192080, at *2 (Minn Ct App Mar. 30, 2010).

Examining the policies of states that considered job loss due to incarceration through the lens of misconduct helps to identify additional factors that are necessary to consider when analyzing cases like Mr. Wilson's. Mr. Wilson made reasonable efforts to contact his employer but he was unable to do so because his employer did not accept collect calls. He also did not willfully or wantonly seek to harm his employer's interests. If given a choice between performing his job duties and being incarcerated, he surely would have chosen to attend work.

B. The Michigan Employment Security Act has already contemplated and found disqualified individuals who lose their jobs due to criminal convictions.

The United States' criminal justice system operates on the premise that a defendant is considered innocent until they are proven guilty. To this effect, an arrest alone is far from the equivalent of a conviction. Regarding conviction, the Michigan Employment Security Act provides guidance as to how being convicted of a crime affects a person's qualification for unemployment benefits. Section 29(1)(f) of the Act states that "[a]n individual is disqualified from

receiving benefits if he or she. . . [l]ost his or her job due to absence from work resulting from a violation of law for which the individual was convicted and sentenced to jail or prison."

Under a plain reading of the statute, losing one's job due to an arrest was explicitly not disqualifying with the addition of 29(1)(f). Here, the legislature considered those individuals who lost their jobs due to conviction and a jail or prison sentence, not mere arrest on suspicion of a crime. By including this more stringent standard for disqualification, the legislature established that losing one's job to arrest alone was not sufficient to disqualify an individual from receiving unemployment benefits. Conviction and a jail or prison sentence are necessary components as well.

Before amending the Act to include specific disqualifications for conviction, the Michigan Supreme Court interpreted these situations under the voluntary leaving provision of the Act. For example, In *Mich Employment Security Comm v Appeal Bd of the Mich Employment Security Comm*, 256 Mich 665, 667-69 (1959), the Court held that a claimant who lost his job for an absence from work due to a conviction for driving without a license did not voluntarily leave work. Though the particular circumstance of absence due to conviction was subsequently addressed by the legislature in 29(1)(f), the general proposition is still valid. As the previously referenced:

> The voluntary assumption of a risk which an employee knows may, but he trusts and assumes will not, keep him from work is not the voluntary leaving of his work. Doing an act, even though voluntarily, which results, contrary to the doer's hopes, wishes and intent, in his being kept forcibly from his work is not the same as voluntarily leaving his work.

Id. at 469.

If Mr. Wilson had enough money to post bail, he would not have been fired from him job because he would have been able to return to work sooner. If he were deemed disqualified from receiving benefits for, this financial hardship would only be magnified. It would be unjust for the

Act to criminalize poverty by removing its safety net from those like Mr. Wilson, whose financial conditions were such that they could not resist the state's exercise of force against them. Consequently, this Court should review Mr. Wilson's case to ensure that the Act is interpreted the way the legislature intended as demonstrated by the Act's consideration of job loss due to conviction.

III. The ALJ exceeded his authority as a finder of fact bound to apply the law when he created new law by judicially imposing a strict liability standard.

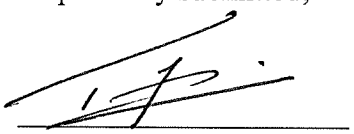
The strict liability interpretation of the "no call, no show" provision being considered in this case originated with Administrative Law Judge Douglas Wahl, who first heard Mr. Wilson's case. As administrative officers, ALJs do not have common law powers. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 736 (1982); *Coffman v State Board of Examiners*, 331 Mich 582, 590 (1951) (citing 42 Am Jur, § 26, p 316 et seq). Therefore, while they are afforded great deference with regards to findings of fact, their authority is limited to the application of applicable statutory provisions and administrative rules.

The ALJ improperly created new law by imposing a strict liability standard on the "no call, no show" provision. This kind of interpretation was not mandated by the language of the statue and not required by any already established reading of the Act. In fact, because "disqualification provisions…are to be narrowly construed," a strict liability reading runs expressly counter to established interpretations of the Act. *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992). By creating new law, the ALJ exceeded his authority as an administrative law judge. In committing this error, however, the ALJ highlighted the need for this Court to establish the correct reading of the provision. This court's guidance will prevent future misinterpretations in the future and unify ALJ decisions.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Sugar Law Center for Economic and Social Justice respectfully asks this court to grant Claimant-Appellant Leonard Wilson leave to appeal pursuant to MCR 7.305(B), or remand the matter to the Court of Appeals for consideration, pursuant to MCR 7.305(H)(1).

Respectfully submitted,



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Dated: January 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2020 I presented the foregoing paper to this Court which will send notification of such filing to the above listed attorneys of record.

/s/ Tony D. Paris

STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	**Case Number:**
LEONARD WILSON V MEIJER GREAT LAKES LIMITED PARTNE	160530

1. Title(s) of the document(s) served:

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Motion - Regular	UIA - Wilson Amicus 1-2-20

2. On 1-3-2020, I served the document(s) described above on:

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Date

/s/ Anthony Paris
Signature

Maurice & Jane Sugar Law Center for Economic and Social Justice

Order Granting Leave and Remanding to the Court of Appeals, May 27, 2020 Michigan Supreme Court

Order

Michigan Supreme Court
Lansing, Michigan

May 27, 2020

160530

LEONARD WILSON,
Claimant-Appellant,

v

SC: 160530
COA: 349078
Ingham CC: 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,
Respondents-Appellees.
_____/

On order of the Court, the application for leave to appeal the October 1, 2019 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 2020

Clerk

a0520

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

Supreme Court Case No. 163412
Court of Appeals Case No. 349078
Ingham CC No. 18-00071-AE

APPENDIX: VOLUME 4

CLAIMANT-APPELLANT LEONARD WILSON'S SUPPLEMENTAL BRIEF

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Claimant/Appellant Leonard Wilson's Brief on Appeal, August 19, 2020 Michigan Court of Appeals

IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Supreme Court Case No. 160530

Court of Appeals Case No. 349078

Circuit Court Case No.18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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BRIEF OF CLAIMANT-APPELLANT LEONARD WILSON

ORAL ARGUMENT REQUESTED

Dated: August 19, 2020

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Appendix 1: *Wilson v Meijer Great Lakes*, unpublished opinion of the Thirteenth Circuit Court for the County of Ingham General Trial Division, issued April 12, 2019 (Case No. 18-711-AE).

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STATEMENT OF JURISDICTION

Mr. Wilson filed a Claim of Appeal asking the Ingham County Circuit Court to review a final decision of the Unemployment Insurance Appellate Commission ("UIAC") holding him disqualified for unemployment insurance benefits under Section 29 of the Michigan Employment Security Act. On April 12, 2019, the court issued its Order and Opinion Affirming Agency Decision. Mr. Wilson filed, *pro se*, a timely motion for reconsideration on May 3, 2019. On May 6, 2019, the Ingham County Circuit Court issued an order denying Mr. Wilson's Motion for Reconsideration. Mr. Wilson then timely filed an Application for Leave to Appeal to the Court of Appeals, which was denied on October 3, 2019. Subsequently, Mr. Wilson timely filed an Application for Leave to Appeal to the Michigan Supreme Court, which remanded his case back to the Court of Appeals for consideration as on leave granted on May 27, 2020.

STATEMENT OF QUESTIONS PRESENTED

I. The Michigan Supreme Court has held that when an individual cannot attend work due to circumstances outside their control, the circumstances that surround any separation that occurs under the Act's voluntary leaving provision must be examined.[1] Yet the ALJ failed to make that examination in this case and instead applied a strict-liability standard that is not present in the language of the statute or through any other precedent of voluntary quit analysis. Did the ALJ break with binding precedent by failing to apply the correct voluntary quit analysis?

Claimant answers "Yes."

ALJ and UIAC answered "No"

II. Courts narrowly construe sections of the Act that disqualify claimants from benefits and liberally construe sections that provide claimants with benefits.[2] Additionally, strict-liability is a disfavored, rarely imposed standard that is foreign to the social benefits context. In fact, a strict-liability analysis is nonexistent within the laws of Michigan unemployment insurance. Nevertheless, both the ALJ and the lower courts decided that MCL 421.29(1)(a) – the disqualification provision regarding voluntary leaving – should be interpreted using a strict-liability standard when they ruled that a claimant who has a three-day "no call, no show" is disqualified from unemployment insurance benefits, regardless of the underlying facts leading to the employment separation. Does the imposition of strict-liability in the unemployment benefits context comply with Michigan Supreme Court precedent on how to interpret the Act or fit with other accepted uses of strict-liability?

Claimant answers "No."

ALJ and UIAC answered "Yes"

III. Administrative law judges are afforded great deference with regards to findings of fact, but they do not possess common law powers; their authority is limited to the application of statutory provisions and administrative rules. Here, the ALJ created new law by imposing a strict-liability standard on the "no call, no show" provision. Did the ALJ exceed his authority in doing so?

Claimant answers "Yes."

ALJ and UIAC answered "No"

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[1] *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201, 216 (1961).

[2] *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992) (holding that the purpose of the Act is to ameliorate the damaging effects of involuntary unemployment).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Leonard Wilson worked for Meijer Great Lakes from October 2014 until September 3, 2017, first as a selector, and then as an assistant team member. (Circuit Court Decision pg 2, Appendix 1).

Mr. Wilson was involuntarily arrested and incarcerated on September 4

On September 4, 2017, Mr. Wilson was arrested and unable to make bond. R 27. He remained in jail for two weeks until his friends were able to put together enough money to bail him out. R 28, 30. Mr. Wilson knew that his employer had a strict attendance policy, which required employees to notify their supervisors of an absence at least sixty minutes before the start of their scheduled shift if they were going to miss work. R 50-51.

Mr. Wilson immediately attempted to call his employer on September 4

After he was incarcerated on September 4, Mr. Wilson immediately attempted to contact his employer, Mr. Todd Wykes, to alert him of his situation and that he would not be able to make his upcoming shifts. R 25. The only way Mr. Wilson could call his supervisor was through an automated hotline. R 20. When Mr. Wilson attempted to do this, he learned that the hotline did not accept collect calls. R 29. Thus, when he called the hotline, no one responded. R 35.

Mr. Wilson attempted to call his employer multiple times on September 5

On September 5, the day after being initially incarcerated, Mr. Wilson used his one courtesy call to try to contact Mr. Wykes. R 30. Unfortunately, Mr. Wykes did not respond. R 25. Refusing to give up, Mr. Wilson called Meijer's guard shack – the security booth at Meijer where Mr. Wykes was often stationed. R 25. But when Mr. Wilson called, Mr. Wykes was not present at the guard shack. R 25. In turn, Mr. Wilson asked the guard shack to leave a message for his supervisor, explaining that he would be unable to come to work. R 25.

Mr. Wilson tried to obtain enough funds to place subsequent calls with his supervisor, but he was terminated before receiving them

Even after leaving a message with the guard shack, Mr. Wilson continually tried to obtain funds from family and friends to place subsequent calls to his supervisor throughout the ten additional days he was incarcerated. R 29. Unfortunately, Mr. Wilson was not able to obtain enough funds. R 29. As soon as Mr. Wilson was released from jail, he called his supervisor to confirm what he feared – that he had been discharged for violating the attendance policy. R 21, 26.

Procedural history

Mr. Wilson attempted to contact his employer at every opportunity he had. Nevertheless, due to circumstances that even Administrative Law Judge Wahl stated were "beyond his control," Mr. Wilson was unable to reach his employer. R 76. Despite his own findings, the ALJ then proceeded to disqualify Mr. Wilson from receiving unemployment benefits. R 72. The reason, the ALJ posited, was because Mr. Wilson "voluntarily" quit his job under a "no call, no show" provision. R 80. Although ALJ Wahl conceded that Mr. Wilson's termination arose from circumstances outside his control, the ALJ stated that the "no call, no show" provision should be analyzed using a strict-liability standard. R 76. Mr. Wilson timely appealed. R 80.

The Michigan Compensation Appellate Commission (MCAC) affirmed the ALJ's decision, also using a strict-liability analysis and thereby declining to examine the circumstances surrounding Mr. Wilson's inability to contact his supervisor.[3] R 81, 82. The Ingham County Circuit Court issued an order affirming the agency decision that Mr. Wilson was disqualified

[3] "MCAC" has since changed its name to the Unemployment Insurance Appeals Commission ("UIAC").

from unemployment insurance benefits. Mr. Wilson timely filed a motion for reconsideration. The Ingham County Circuit Court issued an order denying the motion and affirming its own order and opinion. Mr. Wilson then timely filed an Application for Leave to Appeal to the Court of Appeals, which was denied on October 3, 2019. Subsequently, Mr. Wilson timely filed an Application for Leave to Appeal to the Michigan Supreme Court, which remanded his case back to the Court of Appeals for consideration as on leave granted on May 27, 2020. Mr. Wilson now submits the following argument in support of his appeal of the Circuit Court's April 12, 2019 decision to affirm the agency decision.

STANDARD OF REVIEW

The Court of Appeals reviews the Circuit Court's legal conclusions *de novo* and factual findings for clear error. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). The central issue in this appeal is whether MCL 421.29 is a strict-liability statute to be construed narrowly against claimants. This is a matter of statutory interpretation. Questions of statutory interpretation are considered questions of law. *Id.* Therefore, this Court should review the circuit court's application of MCL 421.29 *de novo*. The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Mericka v. Dep't of Community Health*, 283 Mich App 29, 38 (2009) (citing *Neal v. Wilkes,* 470 Mich 661, 665 (2004)). See also *People v Gardner*, 482 Mich 41, 50 (2008).

The Legislature intended the Act to safeguard the general welfare of the people of Michigan. *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992) (holding that the purpose of the Act is to ameliorate the damaging effects of involuntary unemployment). Accordingly, courts should narrowly construe sections of the Act that disqualify claimants from benefits and liberally construe sections that provide claimants with benefits. *Id.* The application of a statute is a question of law also reviewed de novo. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162 (2011). In *In re Complaint of Rovas Against SBC*, the Michigan Supreme Court unequivocally reaffirmed the standard for courts reviewing an agency's interpretation of a statute:

> . . . in accordance with longstanding Michigan precedent and basic separation of powers principles, we hold and reaffirm that an agency's interpretation of a statute is entitled to "respectful consideration," but courts may not abdicate their

judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation.

In re Complaint of Rovas Against SBC, 482 Mich 90, 91 (2008).

ARGUMENT

This is a case for unemployment benefits where the claimant did everything in his power to alert his employer that he was unable to attend his scheduled shifts in advance. Despite this, he was disqualified for benefits due to his inability to contact his employer for three days in a row because of the limits the employer placed on its accepted communications.

When an employee accrues more than three consecutive absences from work without providing notice in a manner acceptable to the employer, resulting separations are adjudicated under the Michigan Employment Security Act's ("MESA" or "the Act") voluntary leaving provision. This is called the "no call, no show" clause of the MESA. [4]

The Michigan Supreme Court has already established the test for cases adjudicated under the voluntary quit provision. First, courts are required to consider the facts surrounding a separation to determine whether the leaving was actually voluntary. *Warren v Carro Community*

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[4] Prior to 2011, courts reviewed a claimant's absences to consider whether they amounted to misconduct to disqualify them from benefits. *See Wickey v Appeal Bd of Michigan Emp't Sec Comm'n*, 369 Mich 487, 503-04 (1963). Generally, if the claimant had a good reason for missing work that was outside their control, the claimant was not disqualified. *See Washington v Amway Grand Plaza*, 135 Mich 652, 658 (1984). The burden rested with the employer to show that an employee did not have a good reason for consecutive absences. But in 2011, the Michigan Legislature amended Section 29 of MESA to include a clause specifically relating to claimants who accrue three consecutive absences, which is the "no call, no show" clause. MCL 421.29(1)(a). Thus, the amendment moved the analysis of a "no call, no show" from the misconduct provision to the voluntary quit provision. In doing so, the burden shifted from the employer to the claimant to prove whether the leaving was voluntary. This is the same framework used in all other voluntary quit cases.

The amendment simply moved the inquiry surrounding a claimant's absences from the misconduct test to the voluntary quit test. The amendment did not disturb the separate and distinct misconduct and voluntary quit inquiries themselves. Importantly, ALJ Wahl did not find that Mr. Wilson committed misconduct due to the fact that "the claimant had a reason for being absent from work that was beyond his control." R 76.

Hosp, 457 Mich 361, 365 (1998). Indeed, this Court has stated that "a voluntary departure is an intentional act." *Sheppard v Meijer Great Lakes*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No. 300681), p 4 (Appendix 2) (quoting *Ackerberg v. Grant Comty Hosp*, 138 Mich App 295, 300 (1984)). If the leaving was involuntary, the inquiry stops there, and the claimant is not disqualified from benefits. *Warren*, 457 Mich 365. If the claimant left voluntarily, then the second part of the inquiry reviews whether the leaving was with good cause attributable to the employer. *Id.* The test for separations arising out of the voluntary quit provision is well-established. Nevertheless, the lower tribunals failed to apply the test in Mr. Wilson's case.

Specifically, Administrative Law Judge ("ALJ") Wahl declined to examine the circumstances surrounding why Mr. Wilson could not contact his employer to notify him of his absences. In fact, ALJ Wahl declined to examine whether Mr. Wilson's "quit" was voluntary at all. In doing so, the ALJ created his own law by reading a strict-liability analysis into the statute. The ALJ's analysis ran afoul the statute's plain language as well as precedent set out by the Michigan Supreme Court, as previously described. Even more concerning, ALJ Wahl's application of strict-liability to disqualify claimants from benefits is totally foreign to social benefits law.

Claimants who are involved in serious car accidents, experience complications from surgery, or are unable to call their employer for any number of reasons for three consecutive workdays will be denied benefits under the ALJ's erroneous strict-liability standard. This result is not only unjust – falling on involuntarily unemployed workers during some of the hardest times of their lives – it is contrary to this Court's precedent that mandates disqualifying provisions of the MESA be narrowly construed while eligibility provisions be liberally

construed. *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992) (citations omitted)). It also goes against the clear intent of the legislature's declaration of public policy:

> 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 or her family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life.

MCL 421.2. For these reasons, this Court should reverse the decisions of ALJ Wahl and the lower tribunals, apply the correct test for separations arising from the voluntary quit provision, find that Mr. Wilson did not voluntarily quit his job, and that he is thus qualified for unemployment insurance benefits.

I. THE MICHIGAN SUPREME COURT HAS ALREADY ESTABLISHED THE APPLICABLE TEST FOR VOLUNTARY QUIT CASES, WHICH LOWER TRIBUNALS IGNORED.

For the purposes of Michigan unemployment insurance law, a claimant is disqualified from benefits if he voluntarily quits his job, as described in Section 29(1)(a) of the MESA. When a claimant is determined to have voluntarily quit and is subsequently disqualified from benefits, courts analyze the circumstances that surround a claimant's "voluntary quit." Put simply, when a claimant is determined to have voluntarily quit, the quit must have been actually voluntary. *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201, 216 (1961); *see also Warren*, 457 Mich at 366. If the leaving is involuntary, the inquiry stops there, and the claimant is entitled to benefits. *Warren*, 457 Mich at 366-67.

In defining "voluntary," the Michigan Supreme Court has held that "'voluntary' as used in Section 29(1)(a) must connote a decision based upon a choice between alternatives which

ordinary men would find reasonable – not mere acquiescence to a result imposed by physical and economic facts utterly beyond the individual's control." *Lyons*, 363 Mich at 216. This principle of law recognizes that there are instances where an individual cannot attend work due to circumstances outside their control – and provides that, in these circumstances, the claimant did not voluntarily leave his employment.

For example, even though the claimant in *Tomei* knew the plant at which he worked would soon be shut down, he continued working there. 194 Mich App at 182. This was despite given the option to apply to other plant locations. *Id.* at 182-83. This Court reversed lower tribunals' decisions holding the claimant disqualified for benefits, as the plant's closure, and the claimant's subsequent unemployment, was not "unrestrained, volitional, freely chosen, or [a] willful action." *Id.* at 187 (citations omitted).

The holding in *Tomei* speaks directly to Mr. Wilson's case. Like the claimant in *Tomei*, Mr. Wilson became unemployed through no "unrestrained, volitional, freely chosen, or willful action." The first thing Mr. Wilson did after becoming incarcerated was attempt to contact his employer. R 25. Because his employer's attendance hotline did not accept collect calls, he was prevented from successfully contacting his employer despite his timely and diligent efforts. R 29. The next day, Mr. Wilson used his one courtesy call to contact his supervisor, Mr. Wykes, but he did not respond. R 30, 25. Persisting still, Mr. Wilson called Meijer's guard shack, where Mr. Wykes was often stationed. R 25. Again, however, Mr. Wykes did not respond; nevertheless, Mr. Wilson asked the shack guard present to relay his message to Mr. Wykes that Mr. Wilson was calling off his shifts since he could not go into work. R 25.

Even after attempting to obtain funds from family and friends to place subsequent, non-collect calls to his supervisor, he was unable to collect enough money. R 29. Upon being

released from jail, Mr. Wilson immediately called his supervisor to confirm what he feared: he was discharged for violating the attendance policy. R 21, 26. It is obvious that Mr. Wilson wished to retain his job with Meijer. He followed his employer's protocol to the best of his ability considering his circumstances. After encountering numerous obstacles, Mr. Wilson was nonetheless terminated from his position with Meijer for missing three days of work in a row.

Mr. Wilson's incarceration was involuntary. He did not choose to be confined, he did not choose to miss work, and his actions make clear, he certainly did not choose to be separated from his employment. He was unable to contact his employer every day he missed work because his employer did not accept collect calls. Mr. Wilson was only able to leave jail as fast as he could raise money for bail. As soon as he was released, he found that he was forced to accept his firing and subsequent disqualifications from unemployment benefits for "voluntarily" leaving his job for reasons outside his control. [5]

In an unprecedented statutory interpretation of the "no call, no show" clause of the MESA, the ALJ denied unemployment insurance benefits to Mr. Wilson based on his inability to contact his employer in a perfect manner while being detained by the state. Although the ALJ agreed that Mr. Wilson "had a reason for being absent from work that was beyond his control," he nonetheless denied Mr. Wilson benefits under the "no call, no show" clause. In doing so, the ALJ ignored the circumstances surrounding Mr. Wilson's "voluntary quit," thereby ignoring the

[5] Though Mr. Wilson leaving was not voluntary and it is not necessary to consider whether his leaving was with good cause attributable to his employer, Meijer's practices in severely limiting what communication methods were acceptable for calling in should also be considered good cause for Mr. Wilson's leaving. By constructing its call-in system in a manner that effectively blocked access to incarcerated people, Meijer made it impossible for Mr. Wilson to preserve his rights to benefits.

proper analysis for separations arising out of the voluntary quit provision as laid out by the Michigan Supreme Court. *See Warren*, 457 Mich at 366-67; *Lyons*, 363 Mich at 216.

II. THE ALJ'S STRICT-LIABILITY CONSTRUCTION OF THE "NO CALL, NO SHOW PROVISION" IS CONTRARY TO LAW BECAUSE IT IGNORES THE PROPER INTERPRETATION OF THE MICHIGAN EMPLOYMENT SECURITY ACT.

When ALJ Wahl imposed strict liability onto Section 29 of the Act, he overlooked a number of guideposts that indicate the proper way to interpret the statute – including that the provision does not mention anything related to strict liability. Indeed, reading a strict-liability standard into the statute is wholly unsupported by the language and purpose of the statute. Further, the ALJ ignored case law that establishes a strict-liability analysis is improper when adjudicating claims that arise under the voluntary quit provision. Last, the ALJ disregarded binding precedent that mandates courts to construe the MESA to liberally grant claimants benefits, and narrowly construe disqualifying provisions when denying claimants benefits. Because there is nothing to support the ALJ's reading of a strict-liability analysis into the statute, this court should reverse the ALJ's misinterpretation, apply the proper voluntary quit analysis, and grant Mr. Wilson benefits.

A. ALJ Wahl's strict-liability analysis of the "no call, no show" provision runs counter to the plain language and context of the Act, as already defined by higher courts.

It was neither proper nor necessary for ALJ Wahl to develop his own interpretation of the Act. Both this Court and the Michigan Supreme Court have previously established the proper analysis to review "voluntarily leave" cases in the unemployment setting. In reviewing a statute's application and meaning, courts first look at the words included within the statute in order to

give effect to the legislature's intent. *Wessels v Garden Way, Inc*, 263 Mich App. 642, 646-47 (2004) (citations omitted). Statutory language is read according to each word's ordinary and generally accepted meaning. *Id.* If the language is unambiguous, the court assumes the legislature's intent and enforces the statute according to the language's plain meaning. *Id.* A word's plain meaning is ambiguous if it is equally susceptible to more than one meaning. *River Inv Grp, LLC v Casab*, 289 Mich App 353, 356 (2010).

When Michigan courts interpret statutes, "effect must be given, if possible, to every word, sentence, and section . . . so as to produce, if possible, a harmonious and consistent enactment as a whole." *Dussia v Merman*, 386 Mich 244, 248 (1971) (quoting *City of Grand Rapids v Crocker*, 219 Mich 178, 182-83 (1922)). Further, each individual sentence of a statute should be interpreted in the context of the entire statute. *Sun Valley Foods Co v Ward*, 470 Mich 230, 236 (2002).

The provision in question here is MCL 421.29(1)(a), which states that:

> An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.

MCL 421.29(1)(a). The language of the statute is unambiguous. It starts by defining that leaving working is "presumed" to be without good cause attributable to the employer. *Id.* But as this Court has already recognized, a claimant has the opportunity to rebut that presumption by bringing forth evidence showing why the separation was either 1) involuntary or 2) *with* good cause attributable to the employer. *Warren*, 457 Mich at 367. Reading the following operative sentence, the Legislature added a new ground for what shall be considered a voluntary quit. *See*

supra Footnote 4. This new clause, amended in 2011, merely reclassified what would have been a misconduct case (or a MCL 421.29(1)(b) case) – where the burden is on the employer to prove misconduct – into a voluntary quit case, where the claimant now bears the burden to rebut the voluntary quit presumption. *Id.*; *see also Warren*, 457 Mich at 367 (stating that "[w]hether a person left voluntarily will depend on the particular facts and circumstances of the case," implying that there is a presumption of rebuttal). This operative second clause explains that the proper review of this situation is the voluntary quit analysis as defined in *Warren* (457 Mich at 267) – not the misconduct analysis.

The Michigan Supreme Court already reviewed the definition of "voluntarily" leaving one's work, stating that it must mean the claimant "left of his own motion, he was not discharged." *Cooper Range Co v Mich Unemp't Compensation Comm'n*, 320 Mich. 460, 469 (1948) (quoting *MacFarland v. Unemp't Bd*, 45 A.2d 423, 425 (Pa Super Ct 1946)). To "voluntarily quit" one's job means just that, to leave employment on one's own "unrestrained, volitional, freely chosen, or wilful [sic] action." *Tomei,* 194 Mich at 187 (citing Clarke v North Detroit Gen Hosp, 179 Mich App 511, 515-16 (1989), aff'd 437 Mich 280, 287 (1991)).

In this context, "voluntary" is not equally susceptible to more than one definition. But even if there was any ambiguity surrounding "voluntary" as used in the Act, the dictionary definition of the word illustrates that Mr. Wilson's termination was unequivocally the opposite. The Webster's New World Dictionary defines "voluntary" as "given or done of one's own free will; freely chosen or undertaken." *College Dictionary*, Webster's New World (4th ed. 2010). Reading a strict-liability analysis into the statute ignores this generally accepted definition of "voluntary," as well as how this Court and the Michigan Supreme Court have already applied the statute's language regarding "voluntary quit." To decide whether a claimant's actions were truly

"volitional," (*Tomei*, 194 Mich App at 187) the circumstances surrounding the claimant necessarily *must* be examined.

Here, despite Mr. Wilson's attempts to call off from work, his employer discharged him when he could not call into the automated line and ignored his other efforts to contact his superior. He was then disqualified from benefits under the "no call, no show" provision since he was unable to contact his employer through the automated line and missed three scheduled shifts and was accordingly considered to have voluntarily left his position.

Despite ALJ Wahl conceding that Mr. Wilson "had a reason for being absent from work that was beyond his control" (R 76), and despite higher courts mandating that "voluntarily leaving" must be "unrestrained, volitional, freely chosen, or willful" (*Tomei*, 194 Mich App at 187), the ALJ nonetheless disqualified Mr. Wilson. The ALJ's rationale for doing so came from one, unsupported assertion that the statute appeared to him "to be written in terms of 'strict-liability.' That is, if the terms are met, the disqualification applies." R 76. The ALJ's refusal to examine the circumstances outside Mr. Wilson's control thus fundamentally contradicts prior interpretations of what it means to *voluntarily* leave a job. Therefore, it is imperative this Court reject the ALJ's misinterpretation of strict liability and instead utilize the proper voluntary quit analysis to review Mr. Wilson's case.

i. The Act's plain language and context indicate there is a presumption of rebuttal surrounding the "no call, no show" provision, which makes a strict-liability analysis inappropriate.

The Act states that an individual who violates the "no call, no show" provision "shall be *considered* to have voluntarily left work . . . ." MCL 421.29(1)(a) (emphasis added). "Considered" in this context is not equally susceptible to more than one meaning: it must denote something akin to "believed to," or "classified as." Indeed, the Webster's New World Dictionary

defines "consider" as "to regard as; think to be." *College Dictionary*, Webster's New World (4th ed. 2010). Again, this follows considering that the Legislature intended to re-classify this situation as a voluntary quit analysis rather than a misconduct/discharge analysis under MCL 421.29(1)(b). Further, merely two clauses later in the same provision, the Act states that "[a]n individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily. . . ." *Id.* It follows that an employee who violates the "no call, no show" provision – and is thus considered or "regarded" to have voluntarily quit – has the burden to establish that the nature of the "no call, no show" was involuntary. Furthermore, case law has already settled that there is a presumption of rebuttal for any claim arising out of the voluntary quit provision. *See Warren*, 457 Mich at 366-67 (holding that the first inquiry to any voluntary quit adjudication is whether the claimant actually voluntarily left their position). This burden establishes that the provision is not intended to have a strict-liability application because, if it were, the employee's reason for not calling or showing would not matter.

When ALJ Wahl refused to acknowledge the circumstances surrounding Mr. Wilson's alleged "no call, no show," which the statute *considers* to be a voluntary quit, the ALJ inherently ignored Mr. Wilson's proof that his separation was in fact involuntary, the very burden that the Act bestowed upon Mr. Wilson. Therefore, reading a strict liability analysis into the "no call, no show" clause is incongruous to the statute's plain language, which unequivocally places the "no call, no show" clause under the purview of the voluntary quit provision, thereby granting a claimant the opportunity to prove why his separation was involuntary.

ii. The Act's plain language in defining its purpose makes clear that a strict-liability analysis is inappropriate.

The Michigan Employment Security Act contains an unusually explicit declaration of legislative intent. It provides, in part:

> 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 or her family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life.
>
> MC.L. 421.2(1).

The Act's purpose is unambiguous and explicit: to help those who become "unemployment through no fault of their own." *Id.* Its provisions must thus be interpreted in light of this clearly expressed legislative intent. In order to achieve the Act's purpose, a court must examine whether Mr. Wilson's unemployment resulted from circumstances that arose through no fault of his own. ALJ Wahl's strict-liability analysis inherently disregards this analysis.

iii. The Michigan Legislature's 2011 amendment indicates that the "no call, no show" clause is meant to be adjudicated using the applicable voluntary quit analysis.

As described above in Footnote 4, in a 2011 amendment, the Michigan Legislature moved the "no call, no show" provision from being adjudicated under the misconduct provision to being adjudicated under Section 29(1)(a): the voluntary quit provision. *See supra* Footnote 4. There is no indication that despite placing the "no call, no show" clause squarely within the voluntary quit provision, it was nonetheless meant to be exempt from the same inquiry that governs every other separation arising from a voluntary quit as laid out in Michigan Supreme

Court case *Warren*. 457 Mich at 365-66. Accordingly, this Court should utilize the test that *Warren* stated guides all voluntary quit separations. *Id.*

B. Case law establishes that the circumstances surrounding a voluntary quit must be examined, and further holds that Mr. Wilson's leaving was involuntary; accordingly, he is entitled to benefits.

Binding case law requires Mr. Wilson be entitled to benefits, because his situation was not voluntary. The Michigan Supreme Court held that when adjudicating a voluntary quit, the threshold question is whether the employee voluntarily left work. *Warren*, 457 Mich at 365. This Court has further found that if an employee did not voluntarily leave work, the inquiry ends and the employee is entitled to benefits. *Sheppard v Meijer Great Lakes*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No. 300681), p 1.

Moreover, Mr. Wilson's imprisonment was not voluntary, even if the act that led to Mr. Wilson's imprisonment was. Accordingly, Mr. Wilson's "voluntary quit" was not voluntary. The Michigan Supreme Court has held that a claimant who commits an act voluntarily, "which results, contrary to the doer's hopes, wishes and intent, in his being kept forcibly from work is not the same as voluntarily leaving work." *Thomas v. Emp't Sec Comm'n*, 356 Mich 665, 669 (1959). See also *Sullivan v Emp't Sec Comm'n*, 358 Mich 338, 340 (1960) (stating that an employee who was incarcerated outside of the scope of his business did not voluntarily quit due to his "forced absence"); *Larson v Emp't Sec Comm'n*, 2 Mich App 540, 546-47 (1966) (holding that although the employee "voluntarily" signed a resignation letter, the situation surrounding the reason why the employee signed the letter made his quit not actually voluntary); *Laya v Cebar Constr Co*, 101 Mich App 26, 32 (1980) (holding that the employee who quit his new job due to

a 237-mile commute did not "voluntarily" quit his job, as he was "not faced with a choice between alternatives that ordinary persons would consider reasonable.")

In *Thomas*, the claimant was arrested and imprisoned for fifteen days due to driving without a license. 356 Mich at 667. The claimant's employer asserted that since the claimant knowingly drove without a license and subsequently assumed the risk of imprisonment, the claimant effectively left his position voluntarily when he was jailed and unable to go into work. *Id.* at 668. The Michigan Supreme Court declined to permit such a legal fiction, stating that "[t]he voluntary assumption of a risk which an employee knows may, but he trusts and assumes will not, keep him from work is not the voluntary leaving of his work." *Id.* at 669. Accordingly, the claimant in *Thomas* was found qualified for benefits. *Id.* at 670.

The Michigan Supreme Court went even further, stating that the use of "voluntary" must indicate "a choice between alternatives that ordinary people would find reasonable, and has been defined as unrestrained, volitional, freely chosen, or wilful action." *Tomei,* 194 Mich at 187. Indeed, in the situation where a claimant was incarcerated and prevented from going into work, and who was subsequently disqualified from benefits because he was found to have "voluntarily quit" his position, the Michigan Supreme Court declined to permit such a legal fiction to proceed, stating that the Court was not "yet prepared to accept and apply the doctrine of constructive voluntary leaving." *Thomas*, 356 Mich. at 669 (citing *Cooper Range Co*, 320 Mich at 469); see also *Wickey v Unemp't Sec Comm'n*, 369 Mich 487 (1963) (declining to adopt a "constructive voluntary leaving").

Mr. Wilson was found disqualified for benefits under the "no call, no show" clause, which is adjudicated under the voluntary quit provision in the MESA. Accordingly, the threshold question in this case is whether Mr. Wilson's leaving was voluntary. If not, the inquiry ends, and

Mr. Wilson should be entitled to benefits. As the Michigan Supreme Court laid out in *Thomas*, Mr. Wilson's leaving was not voluntary. Like the claimant in *Thomas*, Mr. Wilson was incarcerated for two weeks and unable to go into work.

Even apart from simply being incarcerated, Mr. Wilson's actions while jailed do not show that he had a "choice between alternatives that ordinary people would find reasonable." Mr. Wilson tried calling his employer on September 4, the day he was taken to jail. R 25. After finding that his employer did not accept collect calls, Mr. Wilson tried an array of different methods to contact his superior. R 25; 29-30. Upon being released from jail on September 17, Mr. Wilson immediately called his supervisor to confirm what he feared: he was discharged for violating the attendance policy. R 21, 26.

Michigan Supreme Court precedent establishes that Mr. Wilson's incarceration was not voluntary. His repeated attempts to contact his employer only further corroborate that Mr. Wilson never intended to quit his job. He was discharged from his position, even after repeated attempts to contact his employer – including using his courtesy call. Thus, Mr. Wilson's actions cannot possibly be said to have been voluntary. Accordingly, the threshold question of whether Mr. Wilson's "quit" was voluntary ends here, and Mr. Wilson is entitled to benefits.

i. Other jurisdictions examine the circumstances surrounding a claimant's "no call, no show" to determine whether the leaving was voluntary.

Other states and jurisdictions do not read a strict-liability analysis into "no call, no show" provisions, and instead fully examine the circumstances surrounding a claimant's voluntary quit to determine if it was truly voluntary. See e.g. *Hooker v. Wal-Mart Stores, Inc,* 877 So 2d 1052 (La Ct App 2004); *Hartless v Dir, Ohio Dept of Job & Family Servs*, 4th Dist Pickaway No.

10CA27, 2011-Ohio-1374 (holding that the claimant is disqualified from benefits, but nonetheless examining the circumstances surrounding her "no call, no show" violation); *Eshbach v. Unemp't Comp Bd of Review*, 855 A.2d 943 (Pa Commw Ct 2004) (holding that because claimant believed she was on paid family medical leave, her absence for three consecutive days was not purposeful and that claimant was thus entitled to benefits; however, it was, adjudicated under a misconduct provision).

For example, the claimant in *Hooker* was told by his doctor that he could not return to work due to an injury until a certain date. 877 So 2d at 1053. While the claimant initially agreed with his employer to return to work earlier than his doctor told him, the claimant changed his mind after realizing it would cause him to lose his worker's compensation, which in turn would cause him to lose his apartment. *Id.* at 1054. The claimant then failed to show up for work for three consecutive days. *Id.* The court in this case reversed the lower bodies' decisions, finding that the prospect of losing his worker's compensation justified the claimant's inability to show up for work for three days. Notably, the court arrived at this decision even though the claimant had the full ability to contact his employer. In sum, the court in *Hooker* sufficiently analyzed the circumstances surrounding the claimant's failure to call or show up to work for three days.

Similar to the practices of other jurisdictions, this Court should thoroughly analyze the circumstances that surrounded Mr. Wilson's inability to go into or call his job.

C. Reading a strict-liability analysis into the "no call, no show" provision runs counter to binding precedent that mandates courts construe the Michigan Employment Security Act to liberally grant benefits to claimants.

Courts construe the MESA to liberally grant claimants benefits and narrowly construe disqualifying provisions when denying claimants benefits. Thus, it was inappropriate to make the "no call, no show" provision overly harsh by inexplicably reading a strict-liability analysis into it. The MESA expressly states that the burden of unemployment, which falls with "crushing force upon the unemployed worker and his or her family," must be lightened. Indeed, the Michigan Supreme Court has stated:

> [T]he Employment Security Act is a legislative construct intended to provide relief from the hardship caused by involuntary unemployment . . . Accordingly, this Court will not 'broaden or extend the disqualifications fixed, in plain language, by the legislature. We will, however, keep in mind the legislative purpose of the statute, to get money into the pocket of the unemployed worked at the earliest point that is administratively feasible.

Paschke v Retool Indus, 445 Mich 502, 511 (1994) (citations omitted). Moreover, this Court has consistently held that in order to "safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary employment," the eligibility provisions of the MESA are to be liberally construed, while disqualification provisions are to be narrowly construed. *Tomei*, 194 Mich App at 184 (citations omitted).

The claimant in *Tomei* worked at a manufacturing plant and was told the plant would soon close. 194 Mich App at 182. His employer then gave him three options: he may apply to other branches and transfer locations, he may choose to be laid-off and take severance pay, or he may continue working at the plant knowing that it would soon close. *Id.* at 182-83. The claimant chose the third option, and filed for unemployment benefits when it closed. *Id.* at 183. The

claimant's employer cited that because he knew the plant would close but continued working there, his leaving was voluntary. *Id.* at 187. This Court disagreed, expressly stating that eligibility provisions of the MESA are to be liberally construed, and disqualifications provisions narrowly construed so as to give claimants their benefits to lighten the crushing burden of unemployment, and holding that "voluntary quit" should not be so rigidly defined as the employer would have it. *Id.* at 188.

ALJ Wahl parted with this precedent when he applied a strict-liability analysis to the "no call, no show" provision. The Court in *Tomei* refused to broaden the definition of "voluntary quit" to inevitably deny more claimants benefits. Here, ALJ Wahl broadened the disqualifying provision by inexplicably reading a strict-liability analysis into it. Implementing a strict-liability analysis into this provision – and refusing to consider the circumstances surrounding a claimant's inability to go into or contact his work – would invariably render more claimants disqualified for benefits. ALJ Wahl's strict-liability analysis serves as a heightened barrier to benefits, thereby parting with precedent from both this Court and the Michigan Supreme Court.

i. A strict-liability analysis of the "no call, no show" provision grants too much power to the employer, which is in contravention to how the MESA should be read.

Reading the "no call, no show" provision with a strict-liability analysis affords an employer too much power, which is again in contravention of binding precedent that the MESA must be liberally construed to grant claimants benefits.

One of the "no call, no show" provision's terms posits that an employee must contact the "employer in a manner acceptable to the employer . . . ." MCL 421.29(1)(a). When this term of the provision is read with a strict-liability analysis (which automatically disqualifies a claimant

any time they fail to contact their employer "in a manner acceptable to the employer"), it inherently grants the employer overly broad control in what counts as acceptable and what does not. Specifically, an employer could demand a number of implausible methods for their employees to contact them, or else they be automatically disqualified from benefits.

Indeed, ALJ Wahl makes a point in his order to state that although "it may have been very difficult," Mr. Wilson could have acquired enough funds to call his employer "*every day*" Mr. Wilson was incarcerated. R 76 (emphasis added). But the record establishes that Mr. Wilson made very possible effort to contact his employer: both in the way acceptable to his employer (i.e. the hotline), and through directly calling his superior when that method failed. He attempted to collect enough funds to call his supervisor after he was allowed one courtesy call, but it was impossible for Mr. Wilson to do so – even for one day. R 29.

ALJ Wahl's reading of the statute put Mr. Wilson in a catch 22: he had to notify his employer that he could not come into work in a manner acceptable to his employer by placing non-collect calls, but because Mr. Wilson was incarcerated for two weeks and did not have the funds to place a non-collect call or to make bail to attend his shifts, it was impossible to contact his supervisor in the manner "acceptable" to the employer. Mr. Wilson's efforts show nothing about his job separation was voluntary. He tried calling in multiple times and through multiple methods. As ALJ Wahl would have it, any time a similarly situated employee becomes incarcerated for longer than a three-day period for which they are scheduled to work, and cannot place non-collect calls to let their employer know their situation, they will be disqualified from benefits.

Using a strict-liability analysis in the "no call, no show" provision affords an employer overly broad power. Accordingly, it runs counter to precedent that mandates that courts construe

the MESA to liberally grant claimants benefits, and narrowly construe disqualifying provisions when denying claimants benefits. In order to prevent the employer from having this overly broad power – in contravention to the public policy goals that the MESA specifies – this court should reverse ALJ Wahl's decision disqualifying Mr. Wilson from unemployment benefits.

III. THE ALJ'S STRICT-LIABILITY CONSTRUCTION OF THE "NO CALL, NO SHOW" PROVISION IS CONTRARY TO LAW BECAUSE SUCH AN INTERPRETATION IS NOT PERMITTED UNDER STRICT-LIABILITY PRECEDENT.

A. The ALJ's strict-liability construction of the "no call, no show" provision runs counter to the canon of construction presuming no strict-liability where the legislature does not explicitly create a strict-liability standard.

Courts universally limit strict-liability in statutory application and, as the Michigan Supreme Court has held, "[s]tatutes creating strict-liability regarding all their elements are not favored." *People v Quinn*, 440 Mich 178, 187 (1992). Take, for example, how courts construct criminal statutes. In cases where a criminal statute is not codifying a common law offense and it omits the elements of knowledge or intent, the Michigan Supreme Court has identified that courts should look to the intent of the legislature to determine if the statute should be construed to impose strict-liability. See Id. at 186-90. Yet, the issue of whether the "no call, no show" provision imposes strict-liability disqualification on claimants has received virtually no attention by the lower courts, despite being the foundation for why Mr. Wilson was found disqualified from benefits.

In his decision, the entirety of the ALJ Whal's legal reasoning behind why the "no call, no show" provision should be read as imposing strict-liability is the following: "The statute appears to me to be written in terms of a "strict-liability." That is, if the terms are met, the disqualification applies." R 76 (emphasis added). This limited discussion in ALJ Whal's decision

means that Mr. Wilson's denial is based only on how the statute "appear[ed]" to ALJ Wahl, without any discussion for why we should depart from the presumption against strict-liability. No reviewing court in this case has discussed whether ALJ Whal's unprecedented strict-liability analysis was contrary to law for deviating from this Court's and the Michigan Supreme Court's precedent on statutory construction.

B. The ALJ's strict-liability construction of the "no call, no show" provision is contrary to law because strict-liability has never been imposed on benefit claimants for any social safety net benefit.

Strict-liability is seldom used at all in the public benefits context. On the rare occasions when strict-liability is involved, it has never been used to deny benefits to claimants. Perhaps the most well-known use of enhanced liability in the public benefits context is in workers' compensation. Under Michigan's workers' compensation law, employers are required to insure against workplace injuries regardless of who is at fault. M.C.L. 418.101 *et seq*. This requirement actually imposes absolute liability on the employer, a standard even stricter than strict-liability because it imposes liability regardless of the party at fault. Another example is the Stark Law, a federal anti-kickback law that prohibits physicians from making Medicare/Medicaid referrals to entities with which they or a family member have a financial relationship. Under the Stark Law, a physician who makes a prohibited referral is liable under the act, regardless of their *mens rea*. 42 USC 1395nn. Importantly, both the Stark Law and workers' compensation are widely understood to impose strict liability whereas ALJ Whal's ruling is the first time it has been implemented in the unemployment insurance context.

For the Stark Law and workers' compensation the legislature specifically enacted the strict liability provisions to protect the subjects of their respective statutes. The purpose of strict

liability in the workers' compensation context is to protect the workers from having to litigate on the job injuries as civil tort lawsuits. The Stark Law protects patients from physicians who would otherwise engage in self-dealing. In both cases, strict liability serves and furthers the purpose of the statute. Here, the MESA protects jobless workers claiming unemployment benefits. It does not follow that the ALJ can read in a strict liability provision against the very people the legislature drafted the Act to protect.

Strict-liability does not serve the purposes of the MESA and, in fact, runs counter to them. The Act been interpreted to call for narrowly construction of benefit denying provisions and liberal construction of benefit granting provisions. *Tomei*, 194 Mich App at 184 (holding that the purpose of the Act is to ameliorate the damaging effects of involuntary unemployment). The mere use of the term "voluntarily" in the "no call, no show" provision belies an element of intent, cutting against a strict-liability interpretation. Michigan law provides that words and phrases in statutes should be "understood according to the common and approved usage of language" unless such words and phrases have acquired a "peculiar and appropriate meaning in the law." MCL 8.3a. This rule of construction is to be used "unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3.

In the case of MESA, there is no reason to think that the phrase "voluntary quit" has any peculiar legal meaning outside of its ordinary construction. To "voluntarily quit" one's job appears to mean just that, to leave employment on one's own "unrestrained, volitional, freely chosen, or wilful [sic] action." *Tomei*, 194 Mich App at 187. Here, the lower courts acted in contravention of the legislature's clear intent to liberally provide benefits to those facing involuntary unemployment through no fault of their own. Instead, the ALJ imposed a rarely-

used strict-liability standard to an unusual context – acting on judicial fiat rather than applying the democratically enacted law.

C. The ALJ's strict-liability construction of the "no call, no show" provision is contrary to law because it is unlike the areas of law that are considered appropriate contexts for strict-liability.

In Michigan, strict-liability is a rarely imposed mental state requirement in both the civil and criminal contexts. In civil actions, strict-liability is traditionally applied to cases involving trespass by livestock or involving abnormally dangerous activities. See generally 3 Restatement Torts, 2d. Additionally, sellers of products may be held strictly liable for physical harms caused by use of their products to the user or consumer. 2 Restatement Torts, 2d, § 402A-B.

Imposing a strict-liability requirement in the unemployment benefits context would be entirely outside the scope of previous uses of strict-liability. An employee who commits a three-day "no call, no show" is not injuring the person or property of another, nor are they engaged in any abnormally dangerous activity. These exceptions to the ordinary culpability standards in tort are aimed at increasing the diligence of would-be tortfeasors and compensating their victims. 3 Restatement Torts, 2d, § 520, cmt g. The extreme remedy of strict-liability is uncalled for in the benefits disqualification context. Imposing a strict-liability standard would make an abnormally dangerous mountain out of a "no call, no show" molehill.

Strict-liability offenses are also very rare in the criminal setting. As the Supreme Court of the United States stated in *Morissette,* "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v United States*, 342 US 246, 250; 72 S Ct 240; 96 L Ed 288 (1952). Intent forms the basis of the *mens rea* requirement that is an essential element of nearly all crimes. For this reason, strict-liability

offenses in the criminal context are rare outside regulatory offenses.[6] In Michigan, examples of non-regulatory strict-liability criminal offenses include statutes criminalizing sex between adults and children under a certain age and non-payment of child support. MCL 750.520b; MCL 750.165.

The "no call, no show" provision is also unlike the uses of strict-liability in the criminal context. It is not a comparable situation to child sex crimes or failing to provide child support. Neither is the "no call, no show" provision a regulatory offense designed to promote social order and enforce a broader regulatory scheme. Analogizing the "no call, no show" presumption that a worker voluntarily left work to regulations that criminalize the sale of adulterated food and drugs would undermine the reason that the *mens rea* requirement is relaxed for regulatory offenses. In the food and drug context, the purpose is to "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Morissette*, 342 US at 254. Workers who fail to contact their employer when they miss work are not in that position. Accordingly, there is no basis upon which a court should assume that the legislature created a strict-liability disqualification without clearly expressing so in the statute.

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[6] These regulatory offenses are commonly referred to as "public welfare offenses." Common examples of regulatory offenses include: (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community. *Morissette*, 342 US at 262, n.20.

IV. THE ALJ'S STRICT-LIABILITY CONSTRUCTION OF THE "NO CALL, NO SHOW" PROVISION IS CONTRARY TO LAW BECAUSE IT WOULD YIELD ILLOGICAL AND UNJUST RESULTS.

A. ALJ Wahl exceeded his power as a fact-finding authority when he implemented a strict-liability analysis into the statute.

As previously described, the "no call, no show" provision mentions nothing about reading a strict-liability analysis into the statute. See *supra* Section I(A). Reading a strict-liability analysis into the provision, absent express legislative instructions indicating otherwise, not only runs counter to the plain meaning of the statute (*Id.*), but also exceeds an ALJ's scope of power. As administrative officers, ALJs do not have common-law powers. *Soap & Detergent Ass'n v Nat Res Comm*, 415 Mich 728, 736 (1982); see also *Coffman v. State Bd of Exam'rs*, 331 Mich 582, 590 (1951) (citing 42 Am Jur, § 26, p 316 et seq). Thus, while ALJs are afforded great deference relating to their findings of fact, their authority is limited to applying applicable statutory provisions and administrative rules.

In this case, the ALJ deviated from set precedent and created his own analysis for voluntary quit cases. The "no call, no show" provision here does not indicate that it should be analyzed using strict-liability. Indeed, no provision in the MESA indicates that it should be analyzed using strict-liability. Nevertheless, ALJ Wahl inexplicably imposed such a standard on the "no call, no show" provision, effectively creating new law. Such an interpretation was neither supported by the statute's plain language nor by any previous reading of the provision by any precedent-setting court. By creating new law, the ALJ exceeded the scope of his authority.

B. Wilson's leaving was not voluntary, so it cannot be a voluntary quit.

Just three sentences after ALJ Wahl describes his strict-liability interpretation of the "no call, no show" provision, he agrees that "the claimant had a reason for being absent from work

that was beyond his control." R 76. Unfortunately, ALJ Wahl made a mistake and only addressed Mr. Wilson's control over his situation when addressing whether he committed misconduct. Instead, that reasoning should apply to the aptly named voluntary quit analysis.

A person who is absent from work and unable to contact their employer for reasons beyond their control cannot be said to have voluntarily quit. From the time he was arrested to when he was finally able to make bail, no part of Mr. Wilson's experience can be considered voluntary. Despite being confined against his will, Mr. Wilson did everything in his power to contact his employer about his inability to come in to work. After being incarcerated, the very first thing Mr. Wilson did was to call his employer – only to find that collect calls were not acceptable. R 25, 29. When Mr. Wilson got his single courtesy call, he used it to call his employer and managed to leave a message with other employees to pass along. R 25-30. None of Mr. Wilson's actions indicate a man who wanted to leave his job. Instead, they show a man desperate not to lose his job and doing everything in his power, despite terrible circumstances, to keep it.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Mr. Wilson asks that this Court perform the voluntary quit analysis that Mr. Wilson is entitled to under the law and, accordingly, that he did not voluntarily quit his job and is entitled to unemployment benefits.

Respectfully Submitted,

Dated: August 19, 2020

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IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Supreme Court Case No. 160530

Court of Appeals Case No. 349078

Circuit Court Case No.18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

PROOF OF SERVICE

I state that on August 19, 2020 I served a copy of this Appeal via USPS on the parties at the following addresses:

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Agency/Appellee Unemployment Insurance Agency's Answering Brief, September 23, 2020 Michigan Court of Appeals

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Agency-Appellee.
_____/

Court of Appeals No. 349078

Ingham County Circuit Court
No. 18-000711-AE

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: September 23, 2020

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COUNTER-STATEMENT OF JURISDICTION

Leonard Wilson appeals the April 12, 2019 opinion and order of the Ingham County Circuit Court, and the circuit court's May 6, 2019 order denying his motion for reconsideration. (Agency App 12–21.) This Court denied Wilson's timely application for leave to appeal the circuit court's orders, but our Supreme Court issued an order on May 27, 2020, remanding the case to this Court for consideration as on leave granted. (Agency App 22–23.) Thus, this Court has proper jurisdiction over Wilson's appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Michigan law disqualifies an individual from unemployment benefits when they voluntarily leave work without good cause attributable to their employer, including where they are gone for three or more consecutive days without contacting their employer. The Michigan Compensation Appellate Commission held that Leonard Wilson was disqualified from receiving unemployment benefits because he had three consecutive absences without appropriately contacting his employer. Did the circuit court apply correct legal principles in affirming the Commission's decision?

Appellant Wilson's answer:	No.
Appellee Agency's answer:	Yes.
Appellee Meijer Great Lakes' answer:	Unknown.
Circuit court's answer:	Yes.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 6, section 28, of Michigan's 1963 Constitution

> 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.

MCL 421.29(1)(a) Disqualification from benefits.

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> > (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.
>
> * * *

MCL 421.38(1) Review by circuit court; direct appeal of order or decision of administrative law judge; unemployment agency as party; manner of appeal.

> The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds

that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

INTRODUCTION

It is a well-known and undisputed fact that not all unemployed workers in Michigan are qualified or eligible to receive unemployment benefits. The applicable statute has several disqualification provisions, and the one at issue in this case is straightforward and requires no interpretation. If a worker is absent from work for three or more consecutive workdays without properly contacting their employer, they are considered to have voluntarily left their employment without good cause attributable to their employer, and they are disqualified from receiving benefits as a matter of law.

The record establishes that Leonard Wilson missed more than three consecutive workdays without properly contacting his employer following his arrest and jailing on charges of possessing a controlled substance. He contacted his workplace once but offered no specifics about why he would not be at work that day or about how long he would be away from work. After that, he went a week and a half without appearing for work or contacting his employer.

Each administrative body and the circuit court concluded that Wilson was disqualified from receiving benefits under the plain language of the applicable provision. Wilson overlooks that plain language and asks this Court to rewrite the statute to conform to his beliefs about what an unemployment statute should say. But that request is properly made to the Legislature, not to this Court.

In sum, the circuit court applied correct legal principles in finding Wilson disqualified from receiving benefits. Thus, this Court should affirm that decision.

COUNTER-STATEMENT OF APPLICABLE LAW, FACTS, AND PROCEEDINGS

A. Applicable unemployment law

The Michigan Employment Security Act (MES Act) disqualifies individuals from receiving unemployment benefits under certain circumstances. MCL 421.29. Of relevance here, the MES Act disqualifies an individual who voluntarily leaves work without good cause attributable to their employer. MCL 421.29(1)(a). Where a person is absent for three or more consecutive workdays without appropriately contacting the employer, they are considered to have left voluntarily without good cause attributable to the employer. *Id*. This is colloquially known as the "no-call, no-show" provision.

B. Nature of the dispute

Leonard Wilson began working for Meijer in October of 2014 as a selector, and later became an assistant team member. (R 19.)[1] Wilson's schedule was generally consistent—his shifts began at 6:45 a.m., and he usually had Thursdays and Saturdays off. (R 19–20.) But Wilson's employment ended in early September of 2017 when he failed to report to work for several days and failed to notify Meijer that he would not be reporting to work.

[1] "R" citations refer to the Certified Record of Proceedings filed with the circuit court on or about November 20, 2018, by the Michigan Compensation Appellate Commission. These are citations to documents that are relevant to the background of this case, but are not "necessary for the Court to consider in deciding the appeal," and are therefore were not included in the Agency's appendix. MCR 7.212 (J)(1)(e).

According to Wilson's supervisor, Todd Wykes, Wilson was scheduled to work six days in a row during the week at issue, beginning Sunday, September 3, 2017, with his next day off being Saturday, September 9, 2017. (Agency App pp 35–36.) Wykes testified that while Wilson often had Thursdays off, he was scheduled to work Thursday, September 7, 2017. (Agency App p 35.)

But Wilson was absent on Monday, September 4, 2017, and he failed to call in. (Agency App p 26). According to Wykes, Wilson was absent again the next day, but this time he called Meijer's guard shack to say he would not be in. (*Id.*) Wilson was also absent the next three days, September 6–8, 2017, and did not contact Meijer any of those days. (Agency App pp 26, 28.) Noting Wilson's absence and failure to contact them, Wykes called Wilson twice, but received no response. (Agency App p 27.) Meijer then terminated Wilson's employment because of his multiple no-call, no-show absences. (*Id.*) His effective separation date was September 3, 2017, his last day worked. (Agency App p 28.)

As it turned out, Wilson was absent during the week at issue because he had been arrested on September 4, 2017, for possession of a controlled substance, and he remained in jail until he was able to post bond on September 17, 2017. (Agency App pp 30–32.) Wilson acknowledged his only call to Meijer during his incarceration was the phone call to the guard shack on the afternoon of September 5, 2017. (Agency App p 29.) He indicated he called the guard shack because he was unable to reach his supervisor on the phone, and that he left a message saying he was not

able to make it to work that day due to "unusual circumstances." (*Id.*)[2] Wykes did not recall Wilson ever reporting that he was in jail. (Agency App p 36.) Wilson did not make further contact with Meijer because he could make only collect calls, which Meijer would not accept. (Agency App p 33.)[3] Wilson was aware that Meijer had a policy allowing it to end his employment after he failed to appear for three consecutive shifts, and, when released from jail, he assumed he no longer had a job due to his absences. (Agency App pp 27, 34.)

C. Administrative proceedings

1. The Unemployment Insurance Agency determines that Wilson is disqualified from receiving benefits.

On October 2, 2017, the Agency issued a determination finding Wilson disqualified for unemployment benefits because his attendance issues constituted work-related misconduct. (R 71.) Wilson protested, and in a redetermination dated October 27, 2017, the Agency affirmed its decision. (R 69.)

Wilson filed a late protest of the redetermination, which the Agency denied as untimely. (R 68.) Wilson then appealed and asked for a hearing before an administrative law judge.

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[2] Wilson asserts that Wykes was "often stationed" at the guard shack. (Wilson Br, p 1.) The record citation offered by Wilson does not support this assertion. (Agency App p 29.)

[3] Wilson asserts that he "continually tried to obtain funds from family and friends" to call Wykes. (Wilson Br. p 2.) The record citation offered by Wilson does not support this assertion. (Agency App p 33.)

2. The Administrative Law Judge affirms that Wilson is disqualified from receiving benefits, but modifies the Agency's basis for the disqualification.

The parties appeared before administrative law judge Douglas Wahl on May 31, 2018. (R 1–38.) Based on the testimony and evidence presented, ALJ Wahl held that Wilson had good cause for his late protest to the October 27, 2017 redetermination because he did not receive it. (Agency App pp 4–5.)

On the merits of Wilson's claim for unemployment benefits, ALJ Wahl affirmed the Agency's conclusion that Wilson was disqualified, but based that conclusion on a different section of the MES Act. The ALJ held that Wilson's numerous absences fit better within the voluntary leaving provision of the MES Act (MCL 421.29(1)(a)), than the misconduct provision (MCL 421.29(1)(b)), because it was a more specific provision that applied to claimants with three consecutive absences without contacting the employer in a manner acceptable to them. (Agency App p 5.) He ultimately concluded that Wilson was properly disqualified under § 29(1)(a) because the evidence showed he had three consecutive no-call, no-show absences from September 6 through September 8, 2017. (*Id.*)

3. The Appellate Commission affirms the Administrative Law Judge's decision.

The Appellate Commission unanimously affirmed the ALJ. (Agency App pp 9–11.) It held that Wilson's separation was considered a voluntary leaving "as he was absent without notice for 3 days," and his absence due to incarceration was not attributable to the employer. (Agency App p 9.)

D. Circuit court proceedings

Without hearing oral arguments, the Ingham County Circuit Court issued an opinion and order affirming the Appellate Commission. (Agency App pp 12–18.) The circuit court reasoned that the competent, material and substantial evidence, including Wykes's testimony, supported the finding that Wilson was absent three consecutive days without appropriately contacting his supervisor, and that it must therefore affirm the Appellate Commission's decision disqualifying him from unemployment benefits. (*Id.* pp 16–17.) The court noted Wilson's attempts to contact Meijer on September 5th, but found that those attempts did not comply with Meijer's policy on call-ins. (*Id.*)

Wilson moved for reconsideration, but the court denied his motion because it presented issues that the court already ruled on. (Agency App pp 19–21.)

E. Court of Appeals proceedings

Wilson filed a timely application for leave to appeal the circuit court's decision. This Court entered a unanimous order denying leave to appeal. *Wilson v Meijer Great Lakes Ltd Partnership*, unpublished order of the Court of Appeals, entered October 1, 2019 (Docket No. 349078) (Agency App p 22).

F. Supreme Court proceedings

Wilson appealed this Court's denial of his application to the Michigan Supreme Court. The Court entered an order remanding the case for consideration by this Court as on leave granted. (Agency App p 23.)

STANDARD OF REVIEW

A. This Court reviews lower court decisions on administrative appeals to determine whether the court applied correct legal principles.

Appellate courts review a lower court's decision on an administrative appeal to determine whether the lower court applied correct legal principles and whether the court grossly misapplied the substantial evidence test to the administrative tribunal's factual findings, which essentially constitutes a clearly erroneous standard of review. *Hodge v US Sec Associates, Inc*, 497 Mich 189, 194 (2015); *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424 (2010). A finding is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Dep't of Human Servs v Mason*, 486 Mich 142, 152 (2010), citing *In re Miller*, 433 Mich 331, 337 (1989).

Legal issues preserved for this Court's review are reviewed de novo. *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702 (2018).

B. A circuit court reviews Appellate Commission decisions to determine whether they are consistent with law and supported by the record.

The Constitution sets forth the parameters within which circuit courts review administrative decisions. Circuit courts must determine whether the decisions are authorized by law and, where a hearing is required, whether those decisions are supported by competent, material, and substantial evidence. Const 1963, art 6, § 28, ¶ 1. The MES Act provides that a circuit court's review is limited to those

questions of fact and law made on the record before the administrative law judge and the Appellate Commission and involved in the Commission's final decision. MCL 421.38(1). A circuit court may reverse a final Appellate Commission decision if it is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." *Id*. Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a mere scintilla but less than a preponderance. *Trumble's Rent-L-Center, Inc v Employment Sec Comm*, 197 Mich App 229, 233 (1992).

A reviewing court is not at liberty to substitute its own judgment for an Appellate Commission's decision that is supported with substantial evidence. *Smith v Employment Sec Comm*, 410 Mich 231, 256 (1981). The sole function of the court in reviewing the administrative decision is to determine whether the decision is supported by competent, material, and substantial evidence on the whole record "from which legitimate and supportable inferences were drawn." *Dep't of Comm Health v Risch*, 274 Mich App 365, 375 (2007).

A reviewing court should not invade the fact-finding province of an administrative body by displacing its choice between two reasonably differing views of the evidence. *Goolsby v City of Detroit*, 211 Mich App 214, 220 (1995) (citations omitted). Stated another way, reviewing courts are precluded from reweighing or examining evidence to determine whether the Appellate Commission's decision is objectively correct.

ARGUMENT

I. The circuit court correctly affirmed the Appellate Commission's conclusion that Wilson is disqualified from receiving benefits because he failed to appropriately call in or show up for work for three or more consecutive days.

In this case, both the law and the record evidence support the Appellate Commission's decision that Wilson was properly disqualified from receiving benefits after he failed to report for work or call in for three or more consecutive days. The Appellate Commission properly applied the law to the facts of the case, and the circuit court correctly applied its standard of review to affirm that decision. There is no legal basis for disturbing this decision.

A. Individuals who have three consecutive absences without properly contacting their employer are considered to have voluntarily left their job and are disqualified from benefits as a matter of law.

An individual is statutorily disqualified from receiving benefits if he "le[aves] work voluntarily without good cause attributable to the employer." MCL 421.29(1)(a). The MES Act states: "An individual who is absent from work for a period of 3 consecutive workdays or more without contacting the employer in a manner acceptable to the employer . . . shall be considered to have voluntarily left work without good cause attributable to the employer." *Id.* Thus, an individual with three or more consecutive no-call, no-show days is disqualified from receiving unemployment benefits.

B. Wilson's employment ended when he failed to report to work or properly contact Meijer for more than three consecutive days.

The record establishes that Wilson was scheduled to work each day between September 3, 2017, and September 8, 2017. (Agency App pp 35–36.) He was arrested on September 4, 2017, and remained in jail until September 17, 2017. (Agency App pp 30, 32.) As a result of his incarceration, Wilson missed his scheduled work shifts from September 4 through September 8, 2017. (Agency App pp 26, 28.) It is undisputed that he did not call to report his absences on September 4th, 6th, 7th, and 8th. (Agency App pp 26, 28, 33). Though he contacted Meijer on September 5, 2017, it was not in accordance with Meijer's attendance policy and therefore was not "in a manner acceptable" to Meijer, as required by § 29(1)(a) of the MES Act.

Meijer's policies require team members like Wilson to call in at least sixty minutes before their shift starts to "notify their leadership of an absence." (R 50–51.) Wilson did not do this. Even on the one day that he called in, September 5th, Wilson called in several hours after his usual 6:45 a.m. shift start time. (Agency App pp 26, 29.) Further, Wilson called Meijer's "guard shack" instead of his supervisor or anyone else in a leadership position as required. (Agency App p 26.) And, Wilson merely said that he would not be in that day because of "unusual circumstances," versus providing information regarding the reason for or extent of his absence. (Agency App p 29.) September 5th was the last time anyone at Meijer heard from Wilson for a week and a half.

Thus, there is competent, material, and substantial evidence in the record to support the Appellate Commission's conclusion that Wilson failed to report to work without properly contacting Meijer for three or more days. When such a failure occurs, the MES Act says that the individual voluntarily left employment without good cause attributable to their employer and, therefore, the person is disqualified from receiving unemployment benefits. MCL 421.29(1)(a). Because the Appellate Commission's decision is supported by the record and is consistent with law, the circuit court applied correct legal principles in affirming the decision.

C. Wilson's arguments in favor of reversing the decisions in his case are unsupported by the law or the record.

Wilson implores this Court to find him eligible for benefits, asserting that he did not voluntarily leave his job because he had no control over the reason he was unable to report to work. But his arguments miss the mark. The facts of this case fall squarely within the no-call, no-show provision of § 29(1)(a), and the unambiguous statutory language requires that he be disqualified from receiving unemployment benefits.

1. Wilson overlooks clear statutory language and asks this Court to rewrite § 29(1)(a)'s no-call, no-show provision.

Wilson asserts that § 29(1)(a) should not be applied in a "strict liability" fashion to always disqualify a person with three or more consecutive no-call, no-shows. (Wilson Br, pp 11–30.) Rather, he believes that administrative bodies and the courts must consider the reason why a claimant missed work and failed to call

in and then determine whether the absences were truly within the claimant's control. (*Id*. at 6–10, 12–18, 29–30.) But this overlooks the clear language in § 29(1)(a), which says that if the claimant is a no-call, no-show for three days, their separation is considered voluntary and without good cause attributable to their employer, and they are disqualified from receiving benefits. In the context of no call, no shows, the Legislature chose not to evaluate the circumstances surrounding the no call, no shows. Thus, the Legislature chose not to include in the statute the very thing Wilson now asks this Court to read into the statute. Simply put, the reasons why a person fails to call in for three or more consecutive days is not a part of the analysis.

When interpreting statutes, the Court's "primary goal . . . is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co*, 492 Mich 503, 515 (2012) (quotation omitted). Words and phrases used "should be accorded [their] plain and ordinary meaning, taking into account the context in which the words are used." *Id.* Here, the statute is clear: § 29(1)(a) states that a person who is absent three consecutive days without appropriate employer contact "*shall* be considered to have voluntarily left work without good cause attributable to the employer." MCL 421.29(1)(a) (emphasis added). Thus, a person with three or more consecutive no-call, no-shows is deemed to have voluntarily left without good cause and is disqualified from benefits. The use of the "shall be considered" language is absolute

and leaves no allowance of additional considerations or motivations. There is no other statutorily supported interpretation of this section.

Wilson's repeated use of the phrase "strict liability" is puzzling because it is a legal term of art that is not applicable to this case. Strict liability concepts are more-often explored in tort or criminal cases, with "strict liability" being defined as legal accountability for an injury "that does not depend on proof or intent to do harm," but rather is "based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule." *Black's Law Dictionary* (11th ed). Those concepts are not at issue here. Rather, the issue is whether Wilson is disqualified for unemployment benefits under the MES Act. On *that* issue, Wilson misreads the plain and relevant text of § 29(1)(a). Wilson erroneously argues that the ALJ based his decision on strict-liability principles. However, the ALJ simply made a strict liability analogy relative to the no-call, no-show provision because a claimant is always disqualified if the statutory terms are met. (Agency App p 5.) Thus, contrary to Wilson's repeated assertions, the ALJ did not read anything into § 29(1)(a). (Wilson Br, pp 7, 11, 13, 15, 21–22, 26, 29.) Rather, the ALJ simply read and applied § 29(1)(a) as written.

Wilson asserts that the language in § 29(1)(a) creates a rebuttable presumption that that a person leaving work did so voluntarily. (Wilson Br, pp 12–13, 15.) Wilson leans on a different, more general, provision of § 29(1)(a) in support of this argument, but that provision is not applicable to this case. The second sentence in § 29(1)(a) states the general rule in voluntary leaving cases: "An

individual who left work *is presumed* to have left work voluntarily without good cause attributable to the employer or employing unit." MCL 421.29(1)(a) (emphasis added). In the very next sentence, however, the Legislature addresses the more specific scenario at issue in this case: where a claimant has three or more consecutive no-call, no-shows. There is no language in the no call, no show sentence about any presumption. Thus, Wilson is incorrect when he repeatedly asserts that the burden is on a claimant to rebut any presumption or prove that the reason they were gone for three or more consecutive days without calling-in was beyond their control. (Wilson Br, pp 12–15.)

Wilson wants to treat all voluntary leaving cases the same, but that is not faithful to the Legislature's clear intent. Had the Legislature intended to merely create a rebuttable presumption that those with three or more consecutive no-call, no-shows had voluntarily quit, it could have said that such workers "*are presumed* to have voluntarily left work without good cause." Instead, it chose to use the more direct phrase "*shall be considered* to have voluntarily left without good cause." Wilson is also incorrect when he asserts that "voluntary leaving" has no "peculiar legal meaning." (Wilson Br, p 26.) When it comes to no call, no show scenarios, the Legislature gave "voluntary leaving" a very peculiar or distinctive meaning. That choice of words cannot be overlooked. Yet that is what Wilson asks this Court to do in interpreting the MES Act.

Wilson asserts that use of the word "considered" does not affect his ability to rebut the presumption that he voluntarily quit. (Wilson Br, p 15.) But this is not

supported by the statutory language. "Consider" is defined as "to come to judge or classify." Merriam Webster Online, *Consider*, <https://www.merriam-webster.com/dictionary/consider>, accessed 8/28/20. The use of "considered" denotes the Legislature's intent to classify individuals with three consecutive no-call, no-show absences as having voluntarily quit their job without further inquiry. As stated above, if the Legislature had intended to give those with three no-call, no-shows the option to rebut their classification as having voluntarily quit, they would have used the same presumption language used in the immediately preceding sentence in § 29(1)(a).

Simply put, the plain and clear language of § 29(1)(a) compels the conclusion reached by the ALJ, Appellate Commission, and the circuit court, that Wilson is disqualified from receiving unemployment benefits.

2. The case law Wilson cites is inapplicable and distinguishable, and therefore unpersuasive.

Wilson asserts that the Supreme Court's analysis for voluntary leaving cases established in *Warren v Caro Community Hospital*, 457 Mich 361 (1998), was ignored when the lower tribunals failed to consider the reasons for Wilson's absences and whether they were truly voluntary and within his control. (Wilson Br, pp 7–10, 12–15, 17–19.) Wilson is incorrect, however, because the present case does not require any *Warren* analysis.

Warren establishes a two-step analysis of the general voluntary-leaving provision for unemployment benefits discussed in the previous section, which looks

at: (1) whether the claimant voluntarily left their position, and (2) whether the leaving was without good cause attributable to the employer. *Warren*, 457 Mich at 366. But *Warren* was decided more than 20 years before the enactment of the no-call, no-show provision and, therefore, does not apply here. Indeed, in enacting the no-call, no-show provision, the Legislature took the *Warren* fact-specific analysis out of the equation. Stated another way, the Legislature effectively performed the *Warren* analysis in those specific cases where an individual is gone from work for three or more consecutive days without properly contacting their employer by affirmatively stating that such a claimant *did* leave work voluntarily without good cause attributable to their employer. There is nothing more to analyze. Contrary to Wilson's assertion, the plain text of the no-call, no-show provision fits well within *Warren's* framework.

Wilson also cites to *Tomei v General Motors, Corp*, 194 Mich App 180, 187 (1992), for the proposition that those who do not take "unrestrained, volitional, freely chose, or willful action" when departing have not voluntarily quit; and to *Thomas v Employment Security Commission*, 356 Mich 665, 669 (1959), for the proposition that incarcerated individuals should not be disqualified from benefits because their absence is involuntarily due to their being forcibly kept from work. (Wilson Br, p 18.) But these cases were also decided before the no-call, no-show provision of § 29(1)(a) was enacted. Thus, those courts did not analyze such a scenario in light of the current statutory language. While *Thomas* did involve an employee missing work because they were arrested, it is inapplicable to this case

because the no call, no show provision was not in place. *Thomas*, 356 Mich at 667. In fact, it does not appear that the MES Act provided any guidance on what constituted voluntary leaving when the Supreme Court decided *Thomas*. *Id*. at 672. Here, however, the Legislature has provided clear guidance on what constitutes voluntary leaving.

Importantly, the *Thomas* Court noted that it was improper for a court to do the very thing Wilson asks this Court to do: overlook the plain language of the MES Act to effectively amend it. *Thomas*, 356 Mich at 669 ("Whether one in claimant's situation ought to be disqualified is a question of policy for the legislature, not a judicial question to be determined by the court.") In 2011, the Legislature made a policy decision that individuals who are absent three or more days without contacting their employer are disqualified from receiving unemployment benefits. Wilson may disagree with that policy decision, but it is improper for him to ask this Court to ignore the clear statutory language and rewrite the statute.

Wilson also cites to a more recent unpublished decision, *Sheppard v Meijer Great Lakes Limited*, unpublished opinion of the Michigan Court of Appeals, issued December 20, 2012 (Docket No 300681) (Agency App pp 37–40), in support of his contention that the no-call, no-show provision of § 29(1)(a) requires an analysis as to why the individual left his or her job and whether it was voluntary, and if it was not voluntary the inquiry ends. (Wilson Br, pp 7, 17.) *Sheppard*, of course, is not binding on this Court because it is an unpublished decision. MCR 7.215(C)(1). But it is also distinguishable in a key respect—the Appellate Commission did not

analyze the case under the no-call, no-show provision. In fact, the Court of Appeals noted that the circuit court erred in *Sheppard* because of the lack of analysis of the no-call, no-show provision. (Agency App p 39.) The *Sheppard* panel also noted the lack of record evidence that the claimant was absent on a workday or that she failed to report to work on a day she was expected to work. (*Id*.) This is not the case here. The record evidence demonstrates that Wilson missed several consecutive days when he was scheduled to work, and the ALJ, the Appellate Commission, and the circuit court properly analyzed the no-call, no-show provision.

Finally, Wilson cites to several cases from foreign jurisdictions to illustrate that other courts examine the circumstances surrounding no-call, no-show departures to determine if the claimant's departure was voluntary. (Wilson Br, pp 19–20, citing *Hooker v Wal-Mart Stores, Inc*, 877 So2d 1052 (La Ct App 2004); *Hartless v Dir, Ohio Dep't of Job & Fam Services*, 4th Dist. Pickaway County, Case No. 10CA27, 2011 Ohio 1374; *Eshbach v Unemployment Comp Bd of Review*, 855 A2d 943 (Pa Commonw Ct 2004)). But cases from foreign jurisdictions are not binding. *People v Campbell*, 289 Mich App 533, 535 (2010). Further, none of these cases are persuasive because these jurisdictions do not have a statutory provision that parallels Michigan's no-call, no show provision. See La Rev Stat Ann tit 23 § 1601; Ohio Rev Code Ann § 4141.29 (West 2019); 43 Pa Cons Stat Ann § 802(b) (West 2013). And, *Hartless* and *Eshbach* analyzed misconduct provisions of the Ohio and Pennsylvania unemployment statutes, respectively, as opposed to a voluntary leaving provision like MCL 421.29(1)(a).

In sum, the statutory language in § 29(1)(a) says that individuals who are absent three or more days without proper employer contact are considered to have voluntarily quit without good cause attributable to their employer. Had the Legislature intended this to be anything other than a clear conclusion (such as a rebuttable presumption), it would have said so like it did elsewhere in § 29(1)(a).

3. The Supreme Court recently rejected Wilson's call to apply statutes in a particular ideological way.

Wilson contends that the MES Act is a remedial statute and that the no-call, no-show provision of § 29(1)(a) should be liberally construed in favor of finding him eligible for benefits. (Wilson Br, pp 4, 7–8, 11, 21–22, 26.) But the Michigan Supreme Court recently held that courts should "restrain calls for liberal or strict construction, opting instead for a reasonable construction of all legal texts." *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29 (2018) (internal citations omitted). This Court recently followed *McQueer*'s approach when interpreting the Michigan Employment Security Act. *Barnowski v Cleary University and Unemployment Insurance* Agency, unpublished opinion of the Michigan Court of Appeals, issued July 20, 2020 (Docket No 344917), at 3 (Agency App p 43.)

A reasonable construction is one that is based on the plain language of the statue. As discussed above, the statutory language of § 29(1)(a)'s no-call, no-show provision is unambiguous, and it is clear Wilson's scenario falls within its ambit. Thus, under a reasonable construction of § 29(1)(a), he is disqualified from unemployment benefits.

Wilson also errs when he argues that any interpretation other than the one he asks for is unfair and will lead to unjust results. (Wilson Br, pp 29–30.) But because the language of the no-call, no-show provision is so clear, it does not require a court to construe it or interpret it. Rather, a court must simply apply it to the facts of a given case. Wilson's assertions of unfairness and injustice would be more appropriately addressed to the Legislature than to this Court.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the circuit court's decision because it applied correct legal principles in affirming the Appellate Commission's decision. The record supported the decision that Wilson was disqualified from receiving benefits, and that decision was consistent with law.

The Michigan Unemployment Insurance Agency therefore asks this Court to affirm the circuit court.

Respectfully submitted,

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Dated: September 23, 2020

Claimant/Appellant Leonard Wilson's Reply Brief with Appendices, October 14, 2020 Michigan Court of Appeals

IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Supreme Court Case No. 160530

Court of Appeals Case No. 349078

Circuit Court Case No.18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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REPLY BRIEF OF CLAIMANT-APPELLANT LEONARD WILSON

ORAL ARGUMENT REQUESTED

Dated: October 14, 2020

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I. THE AGENCY'S SUGGESTION THAT THIS COURT SHOULD ABANDON DECADES OF PRECEDENT IS MISGUIDED AND UNPERSUASIVE.

Courts should liberally construe the Michigan Employment Security Act (MESA) to afford coverage, and strictly construe it to prevent disqualification from benefits. *Bureau of Worker's & Unemployment Comp. v Detroit Med. Ctr.*, 267 Mich App 500, 505 (2005). This construction is the "primary rule of statutory construction for cases interpreting the MESA" and a rule that "must prevail, despite any other conflicting rule." *Empire Iron Min. P'ship v Orhanen*, 455 Mich 410, 416 (1997). This rule must prevail despite the Agency's unpersuasive contention that it should not. See Agency Brief at 19.

First, the Agency's use of *McQueer* and *Barnowski* is unpersuasive. To support its claim that the Court should cease to follow a rule it has adhered to for decades, the Agency merely cites to a footnote in *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29 (2018)—which does not even contemplate the statute at issue here. Agency Brief at 19. Instead, *McQueer* interpreted a worker's compensation statue. *McQueer,* 502 Mich 276 (2018). Unlike the workers compensation statute in *McQueer,* the MESA provides clear guidance on how courts should consider disqualification and eligibility provisions of the statute—by reference to the purpose set forth in MCL 421.2. The Court should not abandon its decades-old rule of interpretation because of a footnote to worker's compensation case, and nor has it. Since *McQueer*, courts continue to construe the provisions providing benefits liberally and those that affect disqualification strictly. *See, e.g. Daniel v Ann Arbor Transit Authority*, unpublished opinion of the Court of Appeals, entered December 26, 2019 (Docket No 343860) (finding that MESA is "remedial designed to safeguard the general welfare through dispensation of benefits to ameliorate the disastrous effects of involuntary unemployment . . . .[and the MESA] is to be liberally construed, and the

provisions regarding disqualification from benefits are to be narrowly construed." (emphasis added)).[1] As such, this court should construe the "no call, no show" provision strictly.

Finally, construing the MESA with consideration to its purpose is already a reasonable construction of the statute. That is, a reasonable interpretation is one that maximizes the provision of benefits and minimizes disqualification. The MESA is interpreted with regard to the public policy of the act, which is to "lighten the burden of economic insecurity on those who become unemployed through no fault of their own." MCL 421.2; *Empire Iron Min. P'ship,* 455 Mich at 416, (1997). In light of this purpose, it is reasonable that courts would construe operative parts of the statute in a way that ensures that those who are involuntarily unemployed and need benefits are not erroneously denied them. See *id.*

II. THE AGENCY MISSES STEPS IN STATUTORY INTERPRETATION.

The Agency fails to engage in sufficient statutory interpretation. The Agency insists on a reasonable construction of MCL 421.29(1)(a), but then fails to engage in the required analysis by only citing to the dictionary for one word. The Agency cites *McQueer* for this proposition.[2]

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[1] The Agency also uses *Barnowski* to support its analysis. Not only is *Barnowski* unpublished and therefore not binding on the Court, but the opinion was recently vacated by the Court of Appeals. See MCR 7.215(C)(1); *Barnowski v Cleary University and Unemployment Insurance Agency*, unpublished order of the Court of Appeals, entered September 18, 2020 (Docket No 344917). But even looking to the court's application of the footnote in *McQueer* to an unemployment case, there is no indication that the court intends to move away from its rule of strict interpretation for disqualification provisions and liberal interpretation for benefit provisions. The court in *Barnowski* interpreted a provision in the administrative rules governing notice requirements for appeals, not a MESA provision related to the qualification for or disqualification from benefits. *Id.* at 3. The administrative rules are developed by the Agency and approved by the Joint Committee on Administrative Rules, not the legislature, and therefore not subject to the same legislative intent.

[2] In *McQueer*, the Michigan Supreme Court found that the Court of Appeals erred when it insisted on a narrow reading of provisions of the Workers' Disability Compensation Act, failing to view the provision properly within the surrounding text and statutory scheme. For the same reasons, a narrow reading of the no-call, no-show sentence within MCL 421.29(1)(a), devoid of

Agency Brief at 24. But regardless of the construction approach, *McQueer* shows, statutory interpretation requires more than a simple reference to the dictionary. "A statutory term or phrase 'cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme.'" *McQueer*, 502 Mich at 286 (2018) (citing *Breighner v. Mich. High Sch. Athletic Ass'n, Inc.*, 471 Mich 217, 232 (2004)). Even a reasonable construction of the statute requires more than a mere dictionary definition of a single word in isolation. The Agency bases their construction of the statute on the meaning of a single word, "considered." By failing to address words within the same statutory provision—or even the same statutory sentence—the Agency misses the mark. Here too, the construction of the "no call, no show" provision of MCL 421.29(1)(a) cannot hinge on the definition of a single word, viewed in isolation. Regardless of whether the Court considers reasonable interpretation, it is still required to complete the statutory analysis which includes reviewing the who phrase, provision, and statute. Importantly, neither construction supports a strict liability approach to the "no call, no show" provision. Therefore, the Court should find that the "no call, no show" provision does not disqualify Mr. Wilson from benefits, since he was not voluntarily absent from work.

A. The Agency's Emphasis on a Single, Isolated Word Belies the True Meaning and Effect of the Voluntary Leave Provision.

The Agency focuses its statutory interpretation analysis on a single dictionary definition of a single word in the "no call, no show" provision of the statute. Agency Brief at 19. In doing so, the Agency not only fails to engage in all of the necessary steps of statutory interpretation, but it also fails to fully engage in the single step that it asks the court to focus on: plain meaning.

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any understanding of the context in which the provision sits, should fail here. Without an understanding of the surrounding text and statutory scheme, the Agency's analysis would lead to absurd results.

This contradicts traditional principles of statutory interpretation. When engaging in statutory interpretation, the court's first goal is to give aim to the primary intent of the legislature. *Nyman v Thomson Reuters Holdings, Inc.,* 329 Mich App 539, 544 (2019). The court considers the plain meaning of the statue by "considering both the plain meaning of the critical words and phrases along with their placement and purpose within the statutory scheme." *Id*. While the Court should not overlook the plain language of a statute, it must "give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Servs., Inc*., 466 Mich 304, 312 (2002).

The Agency's analysis did not consider the legislative history, nor did it consider the meaning behind all of operative words and phrases of the provision. Rather it focused its plain meaning analysis solely on a dictionary definition of the word "considered." Agency Brief at 15. A definition, however, is not a replacement for the "demanding task of statutory interpretation that judges are expected to perform using the available data and time-tested rules of construction." *People v Lechleitner*, 291 Mich App 56, 61 (2010). Thus, the Agency cannot just offer a definition and insist, without further inquiry, that it imputes irrefutability.

The legislative history of the provision provides context for the use of the word "considered." As suggested by the Agency, the word "consider" means "to come to judge or classify." Merriam Webster Online, Consider, <https://www.merriam-webster.com/dictionary/consider>, accessed 10/12/20. The use of "considered" reflects the decision of the legislature to classify cases involving claimants with three consecutive "no call, no show" absences as voluntary quit cases rather than a discharge as it was considered prior to this exact amendment. Prior to 2011, these cases would have been adjudicated as a misconduct case under MCL 421.29(1)(b). See, e.g., *Wickey v Appeal Bd of Michigan Employment Security*

Comm, 369 Mich 487, 503-04 (1963). In discharge/misconduct cases, the employer bears the burden of proof, and thus in cases like Mr. Wilson's it would have been the responsibility of the employer to prove that the claimant's absences had amounted to misconduct. The 2011 amendment to the statue reclassified these cases as voluntary quit cases, shifting the burden of proof from the employer to the claimant. By saying that a claimant "shall be considered" to have voluntarily quit after three "no call, no show" absences, the Legislature is signaling that the separation type is not discharge to be adjudicated under 29(1)(b), but rather it is claimant's burden to prove the voluntariness of three or more consecutive absences under 29(1)(a). Thus, the use of "considered" does not reflect an intent to automatically classify *claimants* as having voluntarily quit, rather, it reflects an intent to classify, or come to judge, the *job separation* involving three consecutive "no call, no show" incidences as voluntary quit adjudications, as set up by the Michigan Supreme Court in *Warren v. Caro Cmty. Hosp.*, 457 Mich 361 (1998).

The Agency's analysis also fails to consider the meaning of all critical words and phrases in the provision. By focusing on the word "considered," the Agency fails to give meaning to another operative word in the provision: voluntarily. Immediately following the phrase "shall be considered" is the phrase "to have voluntarily left work." MCL 421.29(1)(a). The word "voluntarily" means "intentionally; without coercion." *Black's Law Dictionary* (11th ed 2019). The Agency's attempt to frame the word "considered" as creating an irrefutable classification of claimants renders the subsequent use of "voluntarily" completely nugatory; any consideration of actual voluntariness is removed from the equation if the classification is automatic.

On the other hand, by properly considering the legislative intent and the provision as a whole, this Court can reach an interpretation of the statute that does not void the word "voluntarily" of all meaning and purpose. In fact, by understanding the Legislature's intent to

now "consider" cases involving "no call, no show" incidences as voluntary quit cases rather than misconduct cases, the word "voluntarily" retains its meaning throughout MCL 421.29(1)(a) and as interpreted by the Michigan Supreme Court in *Cooper Range Co v Mich Unemp't Compensation Comm'n*, 320 Mich 460, 469 (1948) (defining "voluntarily" leaving one's work as meaning that the claimant "left of his own motion" and "was not discharged."). Cases where a claimant left work presume that the claimant left voluntarily but offer the opportunity for the claimant to rebut that presumption. See MCL 421.29(1)(a); *Warren v Caro Cmty. Hosp.*, 457 Mich 361, 367 (1998). When a claimant has three consecutive no call, no shows, this is a voluntary quit case, and must be treated as such. Therefore, the claimant must have the opportunity to rebut the presumption she left work voluntarily.

B. The Court Should Read the "No Call, No Show" Amendment in the Context of the Broader Statutory Provision.

Contrary to the Agency's assertions, examining individual words in a statute is only the starting point of statutory interpretation. The Michigan Supreme Court has highlighted the need for courts construing statutes to "consider *both* the plain meaning of the critical word or phrase *as well as* its placement and purpose in the statutory scheme." *Sun Valley Foods v Ward*, 460 Mich 230, 237 (1999) (emphasis added) (internal citation omitted). When a Michigan court examines a statute, it must give effect "to every word, sentence, and section . . . so as to produce, if possible, a harmonious and consistent enactment as a whole." *Dussia v Merman*, 386 Mich 244, 248 (1971) (quoting *City of Grand Rapids v Crocker*, 219 Mich 178, 182-83 (1922)). The canon of *noscitur a sociis* provides meaning to ambiguous terms and phrases by examining the words surrounding them: "Words and clauses will not be divorced from those which precede and those which follow." *People v Vasquez*, 465 Mich 83, 89 (2001). Additionally, a court should read each provision in concert with surrounding text: "rules of statutory construction require that

separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision." *Gebhardt v O'Rourke*, 444 Mich 535, 542 (1994). Finally, Michigan courts should interpret statutes "to prevent absurdity, hardship, injustice or prejudice to the public interest." *Franges v General Motors Corp.*, 404 Mich 590, 612 (1979).

Here, the structure of the text, coupled with the canon of *noscitur a sociis*, elucidate the proper meaning of voluntary leaving provision. By examining the "no call, no show" sentence in isolation, the Agency fails to give color to the provision regarding claimants who leave work voluntarily. The relevant text of MCL 421.29(1)(a) provides:

> An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer … **An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer**. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer …

The Agency focuses on the 2011 amendments to the voluntary leaving provision. These amendments offer various circumstances in which a claimant is "considered" to have left work voluntarily: where a claimant is absent for work for three or more days without calling her employer, and where she negligently loses a job requirement that she was aware of at the time of hiring. MCL 421.29(1)(a). Because the 2011 amendments shifted the burden of proof from the employer to the employee to show that he did not leave voluntarily, the correct analysis focuses—as mandated by binding precedent—on the issue of voluntariness.

Taken as a whole, the structure of MCL 421.29(1)(a) emphasizes voluntariness. The statute provides various situations in which a claimant may be disqualified from benefits. The

sequential nature of these instances clarifies that they are meant to be read together with one another and the text that precedes them. Notably, the preceding sentence notes the rebuttable presumption that "An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit." MCL 421.29(1)(a). Finally, by placing a burden of proof on a claimant to prove she left work "involuntarily or for good cause" attributable to the employer, the sentence following these two circumstances provide additional support for an interpretation that subjects the "no call, no show" provision to a rebuttable presumption that the employee left voluntarily. Rather than engaging with the whole sentence, or even the entire sentence of the "no call, no show" provision, the Agency's analysis falls short. Its argument fails to address the voluntary leave provision even when there is binding precedent discussing the other important words in the phrase – including "voluntary" and "good cause" – which allows claimants to show why their quit does not disqualify them. Here, the voluntariness presumption is rebutted. Mr. Wilson did not leave work voluntarily—he was incarcerated and unable to make additional calls to his employer to inform them he would be absent from work.

C. The Court Should Align Its Reading of the "No Call, No Show" Provision with the Express Purpose of the Statute.

The Agency's interpretation of the "no call, no show" provision is utterly at odds with the manifest purpose of MESA: to alleviate the "menace" of involuntary unemployment that plagues Michigan's workers. The legislature clearly expressed its purpose that "Involuntary unemployment … 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." MCL 421.2. In construing the Act, Michigan courts have consistently applied this purpose to apply liberally in favor of claimants to give effect to the Act's remedial purpose. *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992) (holding that the purpose of the Act is to ameliorate the damaging

effects of involuntary unemployment); *Empire Iron Min. P'ship*, 211 Mich App 130 (1995) (holding that MESA "is entitled to liberal interpretation to give effect to its remedial policy"); *Korzowski v Pollack Industries*, 213 Mich App 223 (1995) (finding that while MESA should generally be liberally construed, disqualification provisions should be narrowly construed); *Bureau of Worker's & Unemployment Comp*, 267 Mich App 500 (2005) (holding MESA should be liberally construed to afford coverage and strictly construed to effect disqualification).

Consistent with these prior decisions generously applying the Act's purpose in favor of claimants, the Court should interpret the 2011 "no call, no show" amendment as a presumption that a claimant may rebut. A contrary decision would lead to absurd results. Take, for example, a claimant who is absent from work and does not call to inform her employer because she is in a medically induced coma after a car accident. Surely the Act would not contemplate that such a claimant had voluntarily been absent from work. Similarly, here, Mr. Wilson was involuntarily absent from work due to his incarceration despite his attempts to contact his employer.

III. BECAUSE THE STATUTE HINGES ON VOLUNTARINESS, THE *WARREN* TEST SHOULD APPLY.

The Agency's analysis fails to consider that the Michigan Supreme Court already established a test for cases adjudicated under the voluntary quit provision. *Warren v. Caro Cmty. Hosp.*, 457 Mich 361 (1998). Under *Warren*, a court must first consider the facts surrounding a separation to determine whether the leaving was in fact voluntary. *Warren*, 457 Mich at 365. "A voluntary departure is an intentional act." *McArthur v. Borman's Inc.*, 200 Mich App 686 (1993). If the leaving was involuntary, the inquiry ends there, and the claimant is not disqualified from benefits. *Warren* at 366-367. If the court finds that a claimant's failure to show up to work and appropriately notify the employer of his absence was voluntary, that is, intentional and of the claimant's free will, the court may then determine that the "no call, no show" provision means

that it was without good cause attributable to the employer, under step two of the *Warren* test. *Id.* The *Warren* test is well-established, yet the lower courts failed to apply the test in Mr. Wilson's case when analyzing the "no call, no show" clause under the voluntary quit provision. This analysis runs in direct contravention of this Court's voluntary quit precedent. Mr. Wilson's absence from work and his inability to contact his employer was involuntary. Therefore, under *Warren*, Mr. Wilson is entitled to unemployment benefits.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Mr. Wilson asks that this Court analyze the "no call, no show" provision under the voluntary quit test established in *Warren*, which he is entitled to under the law. Accordingly, Mr. Wilson asks that this court finds he did not voluntarily leave his job and is entitled to unemployment benefits.

Respectfully Submitted,

Dated: October 14, 2020

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IN THE MICHIGAN COURT OF APPEALS
Appeal from 30th Judicial Circuit Court For The County Of Ingham
Hon. James S. Jamo

LEONARD WILSON,
Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.
Agency-Appellee

Supreme Court Case No. 160530

Court of Appeals Case No. 349078

Circuit Court Case No.18-000711-AE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

PROOF OF SERVICE

I state that on October 14, 2020 I served a copy of this Appeal via USPS on the parties at the following addresses:

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IN THE MICHIGAN COURT OF APPEALS
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Hon. James S. Jamo

LEONARD WILSON,

Claimant-Appellant

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,

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and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY.

Agency-Appellee

Court of Appeals Case No. 349078

Ingham County Circuit Court
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APPENDIX
CLAIMANT-APPELLANT LEONARD WILSON

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October 14, 2020

STATE OF MICHIGAN

COURT OF APPEALS

SHERRIE DANIEL,
Claimant-Appellee,

v

ANN ARBOR TRANSIT AUTHORITY, also known as ANN ARBOR TRANSPORTATION AUTHORITY,
Appellant,

and

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY,
Appellee.

UNPUBLISHED
December 26, 2019

No. 343860
Washtenaw Circuit Court
LC No. 17-000771-AE

SHERRIE DANIEL,
Claimant-Appellee,

v

ANN ARBOR TRANSIT AUTHORITY, also known as ANN ARBOR TRANSPORTATION AUTHORITY,
Appellee,

and

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY,
Appellant.

No. 343866
Washtenaw Circuit Court
LC No. 17-000771-AE

Before: LETICA, P.J., and GADOLA and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals, the Ann Arbor Area Transportation Authority (AAATA) and the Department of Talent and Economic Development/Unemployment Insurance Agency (Agency) appeal by leave granted the order of the circuit court reversing the decision of the Michigan Compensation Appellate Commission (MCAC), which affirmed the decision of the administrative law judge (ALJ) denying unemployment benefits to claimant Sherrie Daniel. We hold that the MCAC correctly concluded that Daniel was disqualified under MCL 421.29 from receiving unemployment benefits. Accordingly, we reverse the decision of the circuit court.

I. FACTS

Before January 5, 2016, Daniel worked as a motor coach operator for the AAATA. On June 21, 2015, Daniel suffered a heart attack; she testified that she previously suffered a heart attack in 2013. Daniel was on medical leave and received disability payments until approximately December 21, 2015. Under the collective bargaining contract with the AAATA, Daniel was entitled to an additional six months of unpaid medical leave. Daniel testified that she inquired about a desk job with the AAATA but was informed that none were available. She therefore took a medical retirement from her position with the AAATA on January 5, 2016, claiming her accrued leave time.

Following her retirement, Daniel applied for unemployment benefits. The Agency denied her request, finding that Daniel had quit her job for medical reasons but without good cause attributable to the AAATA. Daniel's appeal of the Agency's determination was heard by an administrative law judge, who determined that because Daniel did not seek to be placed on a leave of absence until she recovered, she was disqualified under MCL 421.29 from receiving unemployment benefits. Daniel appealed to the MCAC, which affirmed the ALJ's decision.

Daniel appealed the decision of the MCAC to the circuit court, which reversed the decision of the MCAC. The circuit court concluded that Daniel was not required by MCL 421.29 to request additional leave before resigning because her medical condition was permanent and it would have been futile to request indefinite medical leave. The Agency and the AAATA now appeal the circuit court's decision.

II. DISCUSSION

The Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, is a remedial act designed to "safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment." *Korzowski v Pollack Indus*, 213 Mich App 223, 228-229; 539 NW2d 741 (1995) (quotation marks and citation omitted). The act is to be liberally construed, and the provisions regarding disqualification from benefits are to be narrowly construed. *Id.*

To receive unemployment benefits under the MESA, however, an individual must be eligible under the act. *Shirvell v Dep't of Attorney General*, 308 Mich App 702, 755-756; 866 NW2d 478 (2015). To demonstrate eligibility under the MESA, an individual must meet certain

threshold requirements set forth in MCL 421.28 such as filing a claim for benefits and seeking employment. *Id*. In addition, an individual will be disqualified for benefits if he or she fails to comply with the provisions of MCL 421.29(1)(a), which provides, in pertinent part:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. *An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job.* [Emphasis added.]

Thus, an individual who leaves work without good cause attributable to the employer ordinarily is disqualified from receiving unemployment benefits. MCL 421.29(1)(a); *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 557; 847 NW2d 679 (2014). An individual who claims to have left work involuntarily for medical reasons, however, must demonstrate that before leaving work he or she (1) secured a statement from a medical professional that continuing in his or her job would be harmful to the individual's health, (2) unsuccessfully attempted to secure alternative work with the employer, and (3) unsuccessfully attempted to be placed on a leave of absence until his or her health would no longer be harmed by returning to the job. MCL 421.29(1)(a).

In this case, the Agency and the AAATA contend that Daniel failed to demonstrate the third requirement. The ALJ agreed and concluded, in pertinent part:

> The Employer's physician found the Claimant unable to perform her job duties as a bus driver. The Claimant asked [the employer] about alternative work. There were no other positions open at that time. The Claimant did not ask for an extension or additional leave before resigning for medical reasons. The Claimant had 12 total continuous months of leave available. . . . She resigned at

> approximately six months. The Claimant has met the first two requirements of the statute, but not the third. Therefore, she is disqualified for benefits.

The MCAC affirmed the decision of the ALJ. The circuit court, however, reversed the decision of the MCAC, holding that Daniel had "fulfilled all three statutory requirements of the involuntary leaving for medical reasons provision" of MCL 421.29(1)(a), and thus was qualified for benefits under the MESA.

The MESA expressly provides for judicial review of unemployment benefits claims, *Hodge v US Security Assoc, Inc*, 497 Mich 189, 193; 859 NW2d 683 (2015), as follows, in relevant part:

> The circuit court . . . may review questions of fact and law on the record made before the [ALJ] and the [MCAC] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. . . . [MCL 421.38(1).]

A circuit court reviewing a decision of the MCAC thus must affirm the decision of that tribunal if it conforms to the law, and is supported by competent, material, and substantial evidence on the entire record. *Hodge*, 497 Mich at 193. When reviewing a lower court's review of an administrative decision, this Court must determine whether the lower court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 431; 906 NW2d 482 (2017) (quotation marks and citation omitted). Substantial evidence is evidence that "a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Id*. (quotation marks and citation omitted). The circuit court is not at liberty to substitute its judgment for that of the MCAC if that decision is supported by substantial evidence. *Hodge*, 497 Mich at 193-194. We review the lower court's legal conclusions de novo. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). In addition, the interpretation of a statute presents an issue of law that we review de novo. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007).

In this case, we conclude that the circuit court did not correctly apply the MESA and misapplied the substantial evidence test to the agency's factual findings. The parties do not dispute, and the ALJ found, that Daniel did not unsuccessfully attempt to be placed on a leave of absence until her health would no longer be harmed by returning to her job. The parties also do not dispute that Daniel was entitled to up to 12 months consecutive leave of absence for her medical condition under the collective bargaining agreement, but chose to retire after six months' leave of absence. Daniel contends, however, and the circuit court reasoned, that a request to extend her leave of absence until her health improved would have been futile in this case because her medical condition was permanent and her health was never going to improve enough for her to resume driving a bus. We disagree that this reasoning overcomes the necessity of proving the three requisite statutory elements for demonstrating involuntary leaving for medical reasons.

Moreover, contrary to the circuit court's finding, the record is by no means clear that Daniel's condition was unlikely to improve sufficiently for her to resume her previous job. A review of the record indicates that only two medical records were presented before the ALJ. The first was a letter from a cardiologist, dated September 30, 2015, which stated, in relevant part:

> Mrs. Sherrie Daniel is being treated at the University of Michigan Cardiovascular Center for a cardiac condition. We are extending her back to work date. We will see her in our cardiology clinic on Wednesday, October 14 to discuss cardiac rehab progress and overall cardiac health. We would like to keep her off [work] until after this appointment. She will be able to return to work on Monday, October 19, 2015.

The second record was from October 28, 2015, when Daniel presented at Concentra Medical Centers with a complaint of "intermittent dizziness." Her treating physician completed a "Return to Work Evaluation," stating under "Findings/Recommendations" that "@this time pt unable to return to work in current position as a DOT driver." There was no evidence presented before the ALJ that Daniel was permanently disabled from bus driving.

The statutory language unambiguously provides that the claimant must meet the three requirements articulated in MCL 421.29(1)(a) before her departure would qualify her for unemployment benefits as involuntarily leaving for medical reasons. See MCL 421.29(1)(a). The Legislature's use of the phrase "must have done all of the following" denotes a mandatory requirement. Compare *Fradco v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) ("The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive."). It is axiomatic that this Court will not read words into or "rewrite or embellish the statute." See *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002). Rather, we are constrained to enforce the statute as written. *In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015). Because Daniel did not unsuccessfully request a leave of absence, the ALJ and MCAC correctly found that she is disqualified from receiving unemployment benefits under MCL 421.29(1)(a). The circuit court therefore misapplied the unambiguous provision of MESA and improperly reversed the MCAC.

Reversed.

/s/ Anica Letica
/s/ Michael F. Gadola
/s/ Thomas C. Cameron

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	Case Number:
LEONARD WILSON V MEIJER GREAT LAKES LIMITED PARTNERSHIP	349078

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University of Michigan Unemployment Insurance Clinic

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

LEONARD WILSON,

Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

Supreme Court Case No. 163412
Court of Appeals Case No. 349078
Ingham CC No. 18-00071-AE

APPENDIX: VOLUME 5

CLAIMANT-APPELLANT LEONARD WILSON'S SUPPLEMENTAL BRIEF

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEONARD WILSON,
Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee,

and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY
Agency-Appellee.

Court of Appeals No. 349078
Ingham Circuit Court No. 18-000711-AE

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT LEONARD WILSON'S BRIEF

BRIEF OF AMICUS CURIAE BRIEF ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPORT OF CLAIMANT-APPELLANT LEONARD WILSON'S BRIEF

STATE OF MICHIGAN
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Court of Appeals No. 350690
Ingham Circuit Court No. No.18-000711-AE

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF THE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPPORT OF CLAIMANT-APPELLANT LEONARD WILSON'S BRIEF

The Sugar Law Center for Economic and Social Justice ("Sugar Law") asks this Court, pursuant to MCR 7.212(H), for leave to file a brief as *amicus curiae* in support of the Claimant-Appellant's brief. In support of its motion, Sugar Law states the following:

1. The Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) is a national non-profit law center based in Detroit, Michigan with over 25 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. The Sugar Law Center's central mission includes the promotion of economic and social rights ashuman rights and civil rights within the legal system.
2. Sugar Law has litigated directly on behalf of unemployed workers, in individual and class cases, in both state and federal courts.

3. The proposed Amicus Curiae Brief on behalf of the Sugar Law Center is submitted along with this motion.

RELIEF REQUESTED

WHEREFORE, the Sugar Law Center for Economic and Social Justice asks this Court to grant its motion and allow it to file the proposed Amicus Curiae Brief in Support of the Claimant-Appellant's Appellate Brief.

Respectfully submitted,

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Dated: October 14, 2020

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEONARD WILSON,
Claimant-Appellant,

Court of Appeals No. 349078
Ingham Circuit Court No. 18-000711-AE

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
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and

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BRIEF OF AMICUS CURIAE ON BEHALF OF SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE IN SUPORT OF CLAIMANT-APPELLANT LEONARD WILSON'S BRIEF

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STATUTES AND RULES INVOLVED

MCL 421

AN ACT to protect the welfare of the people of this state through the establishment of an unemployment compensation fund, and to provide for the disbursement thereof; to create certain other funds; to create the Michigan employment security commission, and to prescribe its powers and duties; to provide for the protection of the people of this state from the hazards of unemployment; to levy and provide for contributions from employers; to provide for the collection of such contributions; to enter into reciprocal agreements and to cooperate with agencies of the United States and of other states charged with the administration of any unemployment insurance law; to furnish certain information to certain governmental agencies for use in administering public benefit and child support programs and investigating and prosecuting fraud; to provide for the payment of benefits; to provide for appeals from redeterminations, decisions and notices of assessments; and for referees and a board of review to hear and decide the issues arising from redeterminations, decisions and notices of assessment; to provide for the cooperation of this state and compliance with the provisions of the social security act and the Wagner-Peyser act passed by the Congress of the United States of America; to provide for the establishment and maintenance of free public employment offices; to provide for the transfer of funds; to make appropriations for carrying out the provisions of this act; to prescribe remedies and penalties for the violation of the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act.

MCL 421.2 Declaration of public policy; findings

(1) 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 or her 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.

MCL 421.29 Disqualification from benefits

Sec. 29. (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:

(a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner

acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit.

. . .

(f) Failed without good cause to accept suitable work offered to the individual or to return to the individual's customary self-employment, if any, when directed by the employment office or the commission. An employer that receives a monetary determination under section 32 may notify the unemployment agency regarding the availability of suitable work with the employer on the monetary determination or other form provided by the unemployment agency. Upon receipt of the notice of the availability of suitable work, the unemployment agency shall notify the claimant of the availability of suitable work.

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STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Supreme Court has held that when an individual cannot attend work due to circumstances outside their control, the circumstances that surround any separation that occurs under the Act's voluntary leaving provision must be examined.[1] Yet the ALJ failed to make that examination in this case and instead applied a strict-liability standard that is not present in the language of the statute or through any other precedent of voluntary quit analysis. Did the ALJ break with binding precedent by failing to apply the correct voluntary quit analysis?

   Claimant answers "Yes."
   ALJ and UIAC answered "No."

2. Courts narrowly construe sections of the Act that disqualify claimants from benefits and liberally construe sections that provide claimants with benefits.[2] Additionally, strict liability is a disfavored, rarely imposed standard that is foreign to the social benefits context. In fact, a strict liability analysis is nonexistent within the laws of Michigan unemployment insurance. Nevertheless, both the ALJ and the lower courts decided that MCL 421.29(1)(a)—the disqualification provision regarding voluntary leaving—should be interpreted using a strict liability standard when they ruled that a claimant who has a three-day "no call, no show" is disqualified from unemployment insurance benefits, regardless of the underlying facts leading to the employment separation. Does the imposition of strict liability in the unemployment benefits context comply with Michigan Supreme Court precedent on how to interpret the Act or fit with other accepted uses of strict liability?

   Claimant answers "No."
   ALJ and UIAC answered "Yes."

3. The authority exercised by ALJs is granted to them by the legislature – not the constitution. They lack the "judicial power" vested in the judiciary by this state's constitution. Stautory interpretation is one of the defining aspects of judicial power. ALJs therefore have no authority to interpret statutes. Did ALJ Wahl exceed the authority granted to him by the Act when he constructed a novel interpretation of the "no call, no show" provision?

   Claimant answers "Yes."
   ALJ and UIAC answered "No."

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[1] *Lyons v Appeal Bd of Mich Employment Security Comm,* 363 Mich 201, 216 (1961).
[2] *Tomei v Gen Motors Corp,* 194 Mich App 180, 184 (1992) (holding that the purpose of the Act is to ameliorate the damaging effects of involuntary unemployment).

STATEMENT OF INTEREST[3]

The Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) is a national non-profit law center based in Detroit, Michigan. The Sugar Law Center's central mission includes the promotion of economic and social rights as civil rights and human rights within the legal system. The Sugar Law Center provides legal support to workers and labor organizations on various projects to help ensure workers' rights to fair and decent places to work, as well as to improve benefits to displaced and unemployed workers. In the interest of the rights of all workers and particularly the unemployed and underemployed with whom we work, we submit this amicus brief based on the believe that the outcome of this case will have a significant impact on the rights of our past, present, and future clients.

[3] Students from the Workers' Rights Clinic at the University of Michigan Law School, who were not involved in writing the Wilson Brief on the Merits to this Court, collaborated with the filing attorneys at the Sugar Law Center for Economic and Social Justice in drafting this amicus brief. The Clinic did not make any monetary contribution to fund the preparation or submission of the brief.

INTRODUCTION

Leonard Wilson did everything within his power to notify his employer of his impending absences due to arrest. Unable to post bail, he used his only free phone call – his employer did not accept collect calls – to contact his employer. But no one answered the phone. ALJ Wahl instead refused to consider these circumstances. Instead, he exceeded his authority by creating new law out of whole cloth that does not comport with the voluntary quit provision of the Michigan Employment Security Act ("Act"), contravenes the Act's stated aims, and perverts the criminal justice system. Upholding this interpretation will cause great harm to the Michigan labor market.

Under MCL 421.29(1)(a) of the Act, an employee is ineligible for unemployment benefits if they have voluntarily left their employment without good cause attributable to their employer. An employee who is absent without notice for three or more consecutive days is considered to have voluntarily left work. This provision is known as "no call, no show."

Nowhere in that provision is strict liability contemplated. Indeed, ALJ Wahl cited no authority to support his novel interpretation. Given the scant justification he provided, his ruling likely violated administrative rules requiring that conclusions of law in ALJ decisions be "supported by authority or reasoned opinion." Mich Admin Code, R 792.10133.

The purpose of the Act is to promote general welfare by softening the "crushing force" of involuntary unemployment on those who find themselves unemployed through no fault of their own. MCL 421.2. It works in concert with other labor laws and regulations to facilitate a stable labor market for Michiganders.

Because the average stay in Michigan jails for a misdemeanor arrest is 11 days, the labor market is inextricably intertwined with the carceral state. Michigan Joint Task Force on Jail and

Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 76 (Appendix 5). The Act already disqualifies those who lose their employment due to an absence resulting from *conviction*. Critically, this provision does not disqualify those who lose their employment due to an absence resulting from mere *arrest*. This distinction aligns with the Act's explicit focus on those who are unemployed through no fault of their own: those who are merely arrested have not been adjudicated. Disqualifying them from unemployment benefits preempts the criminal justice process and exacerbates the effects of unemployment. The expansion created by ALJ Wahl's strict liability approach to "no call, no show" contravenes the Act's stated aims and perverts the criminal justice system.

STANDARD OF REVIEW

When reviewing the Circuit Court's underlying decision, the Court of Appeals reviews legal conclusions *de novo* and factual findings for clear error. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). The central issue in this appeal is a matter of statutory interpretation: whether MCL 421.29 is a strict-liability statute to be construed narrowly against claimants. Issues of statutory interpretation are considered issues of law. *Id.* This Court, therefore, should review the circuit court's application of MCL 421.29 *de novo*. The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Mericka v Dep't of Community Health*, 283 Mich App 29, 38 (2009) (citing *Neal v. Wilkes*, 470 Mich 661, 665 (2004)). See also *People v Gardner*, 482 Mich 41, 50 (2008).

The Legislature intended to safeguard the general welfare of the people of Michigan when they drafted the Act. *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992) (holding that the purpose of the Act is to ameliorate the damaging effects of involuntary unemployment). In light of the legislature's intention, courts should narrowly construe sections of the Act that disqualify claimants from benefits and liberally construe sections that provide claimants with benefits. *Id.* Courts review the application of a statute de novo as it is a question of law. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162 (2011). In *In re Complaint of Rovas Against SBC*, the Michigan Supreme Court has stated that although "an agency's interpretation of a statute is entitled to 'respectful consideration,' . . . courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (2008).

ARGUMENT

I. THE ALJ EXCEEDED HIS FACTFINDING AUTHORITY AND CREATED NEW LAW BY IMPOSING A STRICT LIABILITY STANDARD.

Because ALJs only exercise the authority delegated to them by the legislature, they do not exercise the "judicial power" vested in the judiciary by this state's constitution. Const 1963, art 3, § 2; *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 736 (1982); *Coffman v State Board of Examiners*, 331 Mich 582, 590 (1951) (citing 42 Am Jur, § 26, p 316 et seq). With that power comes the solemn duty to "construe and apply the laws." *Johnson v Kramer Bros Freight Lines*, 357 Mich 254 (1959) (quotation marks omitted), citing 1 Cooley Constitutional Limitations (7th ed), p 132. As the Michigan Supreme Court has noted, "administrative fact-finding exercises are entitled to a degree of deference defined by statute and our constitution. However, fact-finding in an administrative contested case . . . is a far different endeavor than construing a statute." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 99 (2008). While ALJs are to be afforded great deference when they engage in statutorily authorized fact-finding, they have no authority to interpret statutes, "one of the defining aspects of judicial power." *In re Complaint*, 482 Mich at 98.

The strict-liability interpretation of the "no call, no show" provision at issue in this case originated with ALJ Douglas Wahl. ALJ Wahl cited no case law, statutory provisions, or administrative rules in support of this interpretation.[4] In fact, because "disqualification

[4] Thus, violating the administrative hearing rules, which require conclusions of law in ALJ decisions to be "supported by authority or reasoned opinion." Mich Admin Code, R 792.10133. In support of his novel interpretation of the "no call, no show" provision, ALJ Wahl only provides the following analysis: "The statute appears to me to be written in terms of a 'strict-liability [sic].' That is, if the terms are met, the disqualification applies." R. at 76. This was not a "reasoned opinion."

provisions . . . are to be narrowly construed," *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992), ALJ Wahl's reading flies in the face of settled judicial interpretations of the Act. By relying on a novel interpretation of the "no call, no show" provision, ALJ Wahl exceeded the authority granted him by the Act and encroached upon the judiciary's remit. ALJ Wahl's error provides this court an opportunity to cement the proper reading of the provision, reducing the likelihood of future misinterpretations by ALJs.

If ALJ Wahl's decision is any indication, a strict-liability standard will open the door to discretionary and inconsistent adjudications of claimants' qualification for unemployment insurance benefits. When a claimant is unable to contact their employer for reasons outside the claimant's control, ALJs will be incentivized to avoid applying the "no call, no show" provision to those with whom they sympathize, obscuring the grounds of their decisions. This practice would increase the workload of the administrative and judicial entities tasked with ensuring that ALJ decisions are "authorized by law." Const 1963, art 3, § 28.

II. ALJ WAHL'S INTERPRETATION OF "NO CALL, NO SHOW" CONTRADICTS THE TEXT OF THE ACT.

The labor market is inextricably intertwined with the carceral state, and the Act already addresses scenarios involving incarceration in MCL 421.29(1)(f). ALJ Wahl's interpretation of "no call, no show" contradicts the text of that provision. According to the Act, individuals are disqualified when they lose their job due "to absence from work resulting from a violation of law for which the individual was convicted and sentenced to jail or prison." MCL 421.29(1)(f).

The provision specifically used the word "conviction," which necessarily assumes an indictment. *Id.* Neither of these preconditions were met in the case of Mr. Wilson. Also, the elements of this provision are construed narrowly. For example, a claimant who loses his job as a result of incarceration stemming from *civil contempt* is not disqualified from benefits as it is

not a violation of law. See *Jerry W Millege v Roofing Man, Inc and MESC*, unpublished opinion of the Saginaw County Circuit Court, issued March 30, 1993 (Docket No. 92-51067-AE-5), p 25, 29 (Appendix 3) (Holding that the "statute was never intended to be applicable to civil contempt.").

Those who have been arrested upon *suspicion* of violating the law, like the claimant in *Millege*, have not violated the law. Had the State legislature intended to disqualify claimants from benefits who lose their jobs due to an absence resulting from a mere arrest, they would have stated as much in the Act. But they did not. Instead the State legislature explicitly stopped short of that action.

III. STATE AND FEDERAL LABOR LAWS PREVENT DISCRIMINATION ON THE BASIS OF ARREST.

Michigan, along with many other states, and executive administrative bodies agree that discrimination against job applicants due to their arrest record is wrong. Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 U Haw L Rev 709, 722 (2000). Both the Equal Employment Opportunity Commission ("EEOC") and the state of Michigan have severely narrowed employers' use of applicants' arrest records in the hiring process.

In Michigan, it is illegal for any private employer to discriminate against a job applicant based solely on a misdemeanor arrest that did not result in conviction. MCL 37.2205a. Sheri-Ann S.L. Lau explains why this approach is so important to the criminal justice system in her article *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*:

> [T]he goal behind laws prohibiting employment discrimination based on an applicant's arrest and court record is to **protect people with criminal records from being forever punished for past crimes by limiting the availability of gainful employment**. This type of legislation seeks to decrease recidivism and to credit

> the rehabilitative process of our judicial system with actual transformation of participants into contributing members of society.

Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 U Haw L Rev 709, 722 (2000) (emphasis added).

Furthermore, courts have interpreted the protections offered by Title VII for specific groups to extend to employer use of arrest records. See, e.g., *Gregory v Litton Sys*, 472 F 2d 631 (9th Cir.1972) (holding that minority prospective employees are not required to list previous arrests); *Green v Missouri Pac RR Co*, 523 F 2d 1290, 1296-99 (8th Cir 1975) (holding that unlawful racial discrimination based on conviction records occurred). Section 2000e-2(a)(2) of Title VII proscribes employers from depriving "any individual of employment opportunities . . . because of such individual's race." Title VII's more narrow scope means that its protections only apply when it can be shown that an employer's use of arrest records adversely affects a named group. Courts, however, do not require a showing of intent to label a labor practice discriminatory. Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 U Haw L Rev 709, 722 (2000).

For some courts, it is enough to show disparate impact with statistics. *Id.* Unfortunately, such a burden would not be difficult to meet. In fact, it is the only logical conclusion when the

disproportionate rate at which black people in Michigan are jailed[5] is considered alongside the eagerness of employers to use arrest records in their hiring practices.[6]

The EEOC, on the other hand, has accepted an even lower standard. In Decision No. 72-1005, they held that when an employer required job applicants to share their arrest records, "it [was] reasonable to infer that such inquiry [would] have a chilling effect upon Negroes' willingness to apply for employment with Respondent and hence is unlawful under Title VII." *Equal Employment Opportunity Comm'n*, EEOC Dec No 72-1005, 2 (1972).

Records of misdemeanor arrest without conviction are not fruitful information for employers in Michigan. The EEOC reached the same conclusion with respect to race. In fact, by barring *all* arrest records – not just misdemeanors – as Michigan has done, the EEOC's guidelines provide a great deal more protection albeit for a far narrower group. Regardless, it is difficult to imagine why Michigan would go to such lengths to protect applicants with misdemeanor arrest records, only to abandon them as unemployment claimants. Each of these proscriptions share a great deal with the aims of the Act. All three strive to promote the general welfare, achieve fairness in labor practices, and maintain stability in the labor market. ALJ

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[5] "Black men made up six percent of the resident population of the counties included in the Task Force's sample of jails but accounted for 29 percent of all jail admissions. There were also significant differences in the most common reasons black people and white people went to jail. Driving without a valid license was a more common reason for jail admission among black people compared to white people, and the opposite was true for operating under the influence—it was a more common reason for jail admission among white people than black people." Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 81 (Appendix 5).

[6] "In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks." US EQUAL EMP'T OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (Apr 25, 2012), p 31, 38 (Appendix 4).

Wahl's interpretation of "no call, no show" is inharmonious with these clearly stated aims and should be reversed.

IV. STRICT LIABILITY FOR "NO CALL, NO SHOW" UNDERMINES THE ACT BY PERVERTING THE CRIMINAL JUSTICE SYSTEM.

The Act recognizes that "[e]conomic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state" and endeavors "to provide for the protection of the people of this state from the hazards of unemployment." MCL 421 and 421.2. ALJ Wahl's radical expansion of MCL 421.29(a) perverts the criminal justice system by sanctioning State punishment – disqualification – against claimants on the basis of their arrest, prior to their criminal adjudication let alone indictment. Applying strict liability, "no call, no show" becomes an end-run-around the presumption of innocence, that "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *People v Buckey*, 424 Mich 1, 32 (1985) (quoting *In re Winship,* 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970)). If this interpretation of MCL 421.29(a) is upheld, arrestees will be left in the lurch. They will be exposed to all the hazards of unemployment that the Act intended to shield them from in cases of involuntary separations.

The consequences of this provision are clear: more claimants will be disqualified from benefits on involuntary grounds and the labor market will suffer accordingly. The county jail population in Michigan has nearly tripled since 1975 despite plummeting crime rates and has been driven in equal parts by pre-trial and post-conviction incarceration. Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 78 (Appendix 5). Cash bail, as it is currently used in Michigan, prevents thousands from returning to work once arrested and held in pre-trial detention. *See id.* 76 (Appendix 5) (The average stay in Michigan jails for a misdemeanor arrest is 11 days). After an arrestee is released, even

without any charges filed, he faces a wave of devastating consequences collateral to his mere arrest that further hinder his return to society.

A. A strict liability approach to "no call, no show" undermines the Act by exacerbating recidivism.

The carceral state and its civil tentacles of collateral consequences wage a crushing battle against the poor that contributes to recidivism. Incarceration leads to future, more taxing, interactions with the criminal justice system. Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 76 (Appendix 5). Arrestees face a host of penalties prior to any adjudication, let alone conviction, which predispose them to future arrest. *See Id.* at 76 (Appendix 5). The Agency ought not contribute to that with a strict liability application of "no call, no show." Disqualifying claimants from benefits due to low-level, pre-arraignment arrests gratuitously promotes recidivism which is counter to the aims of the Act.

Sixty percent of arrests in Michigan are for misdemeanors. *Id.* at 81 (Appendix 5). Misdemeanor convictions are a gateway to felonies as they increase the likelihood of future arrest and subsequently harsher penalties.[7] That is unsurprising, considering the impact that stigma has on a formerly law-abiding citizen. Natapoff, *Misdemeanors*, 85 S Cal L Rev 1313, 1327 (2012). Unemployment insurance ameliorates these costs by offering a bridge between jobs. Removing it with a strict liability application will worsen the carceral crisis we face by increasing recidivism.

Scholars widely agree that joblessness increases the likelihood of recidivism. Elliott, *An End Run Around Employment Obstacles: Small Business Development Programs for Returning*

[7]Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 76 (Appendix 5); Natapoff, *Misdemeanors*, 85 S Cal L Rev 1313, 1316 (2012).

Citizens, 19 U Md LJ Race, Religion, Gender & Class 339, 345 (2019). In fact, prominent corrections officials have said that employment is the most important predictor of recidivism along with education. Nally et al, *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States*, 9 Int'l J of Crim Just Sci 16 (2014), p 122, 134 (Appendix 6). The data supports these claims.

> **[P]ost-release employment was the major predictor of recidivism, regardless of an offender's classification** (i.e., violent, non-violent, sex, and drug offenders). The most notable finding from this study was . . . that **virtually all ex-offenders could not find a job** and the unemployment rates were in the range of 92-97 percent within 1-3 quarters of release from prison.

Id. at 135 (Appendix 6) (emphasis added). Mr. Nally's study focused on convicted individuals, but we know, as in Mr. Wilson's case, that even short periods in pre-detention jeopardize a person's employment. *Cf* Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 84 (Appendix 5) (35% of stays in jail last more than a week.).

The Act aims to minimize the pains of unemployment and foster reemployment for those involuntarily unemployed. Arrestees who are fired as a result of pre-trial detention are in desperate need of such relief. Without it, they are significantly more likely to recidivate. ALJ Wahl's unilateral disenfranchisement of claimants like Mr. Wilson will increase recidivism and undermine the goals of the Act.

B. Cash bail will functionally create a per se disqualification for arrested claimants due to ALJ Wahl's "no call, no show."

Cash bail ties an arrestee's liberty, livelihood, shelter, custody of their children, and, now, unemployment benefits to their wealth. These are sacred pillars in one's life. Placing a price on them demeans them and undermines the principle of "innocent until proven guilty." There is a heavy emotional toll for families who cannot afford bail. This challenge is particularly difficult

for families who are dealing with involuntary unemployment. There is a very good chance they will not be able to afford to purchase their liberty. In Wayne County, "[m]ore than 40 percent of those with bail set between $2,500 and $10,000, and 38 percent of those with bail set at or below $2,500, remained in jail until the resolution of their cases. *Id.* at 85 (Appendix 5). With so many arrestees unable to pay for their freedom, ALJ Wahl's "no call, no show" will only serve to deepen the hole arrestees find themselves in.

Proponents of cash bail claim that it is a necessary tool to increase public safety and ensure that defendants appear for their court dates. But it has failed to meet these goals[8] while exacting a terrible cost on the our carceral state's most vulnerable. Cash bail asks arrestees to pay for their liberty or else live in squalor and increase their chances of conviction. Consider the tragic story of Kalief Browder:

> When police officers arrested seventeen-year-old Kalief Browder for allegedly stealing a backpack, they said, "We're just going to take you to the precinct. Most likely you will go home." But Kalief Browder never went home, and instead, spent the next three years of his life languishing in a Rikers Island prison cell. After police arrested Browder, a judge set his bail at $3,000, a fee that his family could not afford, and Browder spent years suffering in Rikers Island before the prosecution eventually dismissed his case. After three years of jail time and nearly two years of solitary confinement, Kalief Browder committed suicide at the age of twenty-two.

Sardar, *Give Me Liberty or Give Me ... Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 Brook L Rev 1421, 1421 (2019).

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[8] "The American Bar Association and other leaders in the field have condemned money bail both because it has not been shown to increase public safety and because it does not prevent failures to appear.9 Further, cash bail does not prevent crime. The United States and the Philippines are the only two countries with a cash bail system, and neither country is in the top 60 as one of the world's safest countries.10 One non-profit, Brooklyn Bail Fund, which posted bail for more than 4,000 people who could not afford it, also reported that those who were released were three times as likely as those who weren't to have favorable outcomes to their cases." Giles-Perkins, *Justice Delayed Is Justice Denied: Holding Cash Bail Unconstitutional*, 25 Pub Int L Rep 102, 103 (2020).

Conditions at Rikers were notoriously bad.[9] Yet pre-trial detainees are most likely spending their time in similarly sub-standard conditions which encourage plea-bargains and increase the likelihood of conviction at trial. Sardar, *Give Me Liberty or Give Me ... Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 Brook L Rev 1421, 1437 (2019). Pre-trial detention conditions are typically sub-standard due to the fact that it typically occurs in under-funded, locally operated jails. *Id.* Detainees may have to endure cockroaches, mold, and threats of violence from other detainees. *See* Giles-Perkins, *Justice Delayed Is Justice Denied: Holding Cash Bail Unconstitutional*, 25 Pub Int L Rep 102, 104 (2020). All of this is in addition to the stress that would expectedly come from living in a cage in and of itself. Subjection to such conditions manufacture plea-bargains. Sardar, *Give Me Liberty or Give Me ... Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 Brook L Rev 1421, 1437 (2019). For those who go to trial, pre-trial detention presents barriers to preparing for trial which those who can afford bail do not face. Pre-trial detention makes it more difficult to hire a private attorney or to see your attorney at all.

The failure of money bail in Michigan is now well-known and high-ranking state officials encourage its reform. *See* Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (Jan 10, 2019), p 72, 89 (Appendix 5). We should not expect that claimants can afford to pay for their pre-trial release and ALJ Wahl's "no call, no show" will leverage the failure of this practice. None of this promotes the general welfare. Far from

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[9] Brown & Marcius, *NYC district attorneys alarmed by accounts of horrible conditions at Rikers amid coronavirus outbreak*, NY DAILY NEWS (Oct 1, 2020, 8:54 PM), https://www.nydailynews.com/new-york/ny-district-attorneys-rikers-conditions-20200406-rdjvtuwfsndqtmzuit3t66bkhq-story.html, p 16 (Appendix 2); Ball, *Tales from inside Rikers, the notorious NYC jail set to close*, FR 24 (Oct 1, 2020, 9:01 PM), https://www.france24.com/en/20180226-tales-inside-rikers-island-notorious-new-york-jail-prison-close, p 3 (Appendix 1).

lightening the burden of involuntary unemployment, ALJ Wahl's new law would exacerbate matters for some of our most vulnerable claimants.

C. The Unemployment Insurance Agency should not add to the collateral consequences arrested claimants face.

When administrative courts impose collateral consequences[10] onto claimants as a result of their unadjudicated criminal matters, they undermine the criminal justice system by stigmatizing the uncharged and undercutting efforts to reduce recidivism. There has been a great deal of scholarship conducted on the collateral consequences stemming from a conviction. The ALJ's interpretation of "no call, no show" is a troubling expansion to pre-conviction collateral consequences and erodes public trust in the criminal justice system's integrity.

The reality for those touched by our criminal justice system is quite far from the common view that suspects are innocent until proven guilty and that punishments are tailored to fit the crime. A criminal sentence may be bound by the proportionality doctrine and sentencing guidelines which aim to individualize sentencing to particular defendants. Yet collateral consequences often have no such limiting or individualizing mechanisms.

Collateral consequences can include license suspension, pension loss, deportation, eviction, and ineligibility for federal student loans. The list has grown recently as criminal records have become more accessible due to digitalization. Jain, *Proportionality and Other Misdemeanor Myths*, 98 BU L Rev 953, 958 (2018). Justice Center researchers at the Council of State Governments have identified over 40,000 collateral consequences spread across state and

[10] "By collateral consequences, I am referring to civil penalties triggered by criminal arrests and convictions, such as loss of work or deportation. For a sampling of recent contributions to the literature on collateral consequences "Jain, *Proportionality and Other Misdemeanor Myths*, 98 BU L Rev 953, 980 (2018).

federal codes. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 Federalist Soc' Rev 36, 39 (2018).

The civil penalties that are heaped onto defendants by virtue of their arrest or conviction are categorical and, in many cases, more damaging to them in the long-term than the sentence itself. Heaton et al, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan L Rev 711, 713 (2017). For example, MCL 333.7403(2)(d) describes the sentencing for misdemeanor possession of marijuana: imprisonment up to one year and/or a fine up to $2,000. Michigan judges are free to take the criminal history of those charged with this crime into account, though. A judge can individualize a sentence to the defendant before her by, for example, giving a first offender probation and a suspended sentence.

Categorical collateral consequences are not capable of the same individualization. Prior to receiving leniency at sentencing, the defendant will likely have to pay a bail bondsman or else risk losing their job or custody of their children. *Id.* 713–14.

If ALJ Wahl's decision is upheld, this class of defendants will also be found ineligible for unemployment benefits per "no call, no show." For certain, there are many claimants who would rather be convicted on marijuana possession and pay $2,000 in fines if they were allowed to receive benefits in the event that they were fired due to "no call, no show" resulting from their pre-trial detainment.

In some cases, such as categorical proscriptions on convicted sex offenders approaching schools, the public safety benefit of collateral consequences surely outweighs the burden placed on the individual. That could never be the case for the uncharged, however. Civil penalties assigned to arrestees are gratuitous when the State does not even allege that a crime has been committed.

CONCLUSION & RELIEF REQUESTED

For foregoing reasons, the Sugar Law Center for Economic & Social Justice respectfully asks this Court to grant its motion and allow it to file the proposed Amicus Curiae Brief in Support of the Claimant-Appellant's Appellate Brief.

Respectfully submitted,

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Dated: October 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 14. 2020 I presented the foregoing paper and appendices to this Court which will send notification of such filing to the above listed attorneys of record.

/s/ Tony D. Paris

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEONARD WILSON,
Claimant-Appellant,

v.

MEIJER GREAT LAKES LIMITED PARTNERSHIP,
Employer-Appellee,
and

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY
Agency-Appellee.

Court of Appeals No. 350690
Ingham Circuit Court No. No.18-000711-AE

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CLAIMANT-APPELLANT LEONARD WILSON'S

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122-141	Attachment 6	Nally et al, *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States*, 9 Int'l J of Crim Just Sci 16 (2014).

ATTACHMENT 1

USA

Tales from inside Rikers, the notorious NYC jail set to close

Issued on: 03/03/2018 - 16:29 Modified: 03/03/2018 - 17:46

Emmanuel Dunand, AFP | A view of buildings at the Rikers Island penitentiary complex in New York on May 17, 2011.

Text by: Sam BALL 9 min

New York's notorious Rikers Island jail complex has been plagued by allegations of corruption, violence and human rights abuses, and plans are now in place to shut it down for good. Few who have passed through its gates will be sad to see it go.

, correspondent in New York

There is a smell to prison, says Johnny Perez, a former detainee at Rikers Island -- the vast 400-acre jail complex named for the speck of land adrift in New York's East River on which it sits. It is the kind of smell that "sticks to your clothes", he says – "toxic, like sewage mixed with cheap disinfectant".

The first time Perez was confronted by that distinct odour he was 16 years old, arriving at Rikers for what would turn out to be a year-long stretch on gun possession charges. He would find himself back there a number of times over the next five years, for offences ranging from loitering to trespassing and drug possession, most recently in 2011.

On the bus ride to the prison complex – a collection of 10 detention facilities located between the Bronx and Queens and connected to the mainland by a solitary, narrow bridge – he was not sure exactly what he would find when he arrived. But he knew it would not be good.

"I had heard people who had come out of Rikers Island and they would talk about the horrors that they'd experienced," he says.

Welcome to the 'butcher's shop'

Since an explosion of violence during the New York crack epidemic of the late 1980s and early '90s, reports of brutal treatment of those incarcerated at Rikers, beatings meted out by gangs and guards, and sexual abuse and rights violations have never been far from the media.

Despite efforts over the years to improve security and an increased scrutiny of conditions at Rikers, a report released this month found that incidents of violence actually rose from 2016 to 2017.

For some time, activists and campaign groups have argued that the only way to really deal with the problems at Rikers was to shut it down entirely. City and state officials, most notably New York Mayor Bill de Blasio, have recently come to agree.

In March last year, following the findings of an independent commission on justice reform in New York that concluded "Rikers Island must be closed", Mayor de Blasio announced his intention to end the use of Rikers Island as a detention facility in the next 10 years.

Last month, the plan to do so began to take shape, with city officials unveiling the sites of four new jails across the city to replace Rikers once it has been shut down.

For Perez, the first confirmation of his fears came when he was assigned to a housing area. A correctional officer (CO) told him he was going to a place called "the butcher's shop".

"I thought he was talking about a kitchen or something," Perez says. "But he said no, that's just what they call the housing area, it's where most of the slashings and cutting at Rikers take place."

History of violence

Five Mualimm-Ak first came through Rikers in the early '90s, at the tail end of the crack epidemic, when life at the jail was perhaps at its most savage and gang violence was rife.

"It was just a place where it was like gladiators, where if you didn't know how to fight, didn't have a weapon, you better get one," recalls Mualimm-Ak, now 44 and a criminal justice reform campaigner. "On my first day, someone got stabbed right there and then. He was just there

bleeding in the corner of the cell."

Mualimm-Ak would serve subsequent spells at Rikers for various offences up until 2007, during which time he saw how the jail evolved. The structures that had allowed gangs to take control had, in later years, become part of the "regular routine", he says. "It grew worse and worse."

COs would often let gang leaders hand out violent punishments for infractions, rather than get their hands dirty.

"Let's say I'm the officer and you're the person incarcerated, if I have a problem with you, you're getting on my nerves or whatever, I'll have gang members just beat you up, so I don't have to get into an altercation with you," he says.

But direct confrontations between COs and detainees are also a problem.

Back in 2012 an inmate called Ronald Spear died at the hands of a CO, while last month the brutal beating of a correctional officer by a group of inmates reportedly left the CO in hospital with a spinal fracture.

"I've got countless examples," Perez says. "I've been in situations where I've seen COs pin two people together and have them fight each other."

On another occasion, he recalls being punished for fighting with another detainee in the bathroom. "The CO just made us stand with our hands against the wall facing the wall and punched us in the kidneys."

'A different type of alone'

Inmates also have to contend with the poor condition of an ageing and, according to those who have spent time there, dilapidated jail complex.

"It's not uncommon to walk into a cell and the paint is coming off the walls," says Perez. "There are roaches – definitely roaches – mice and rats.

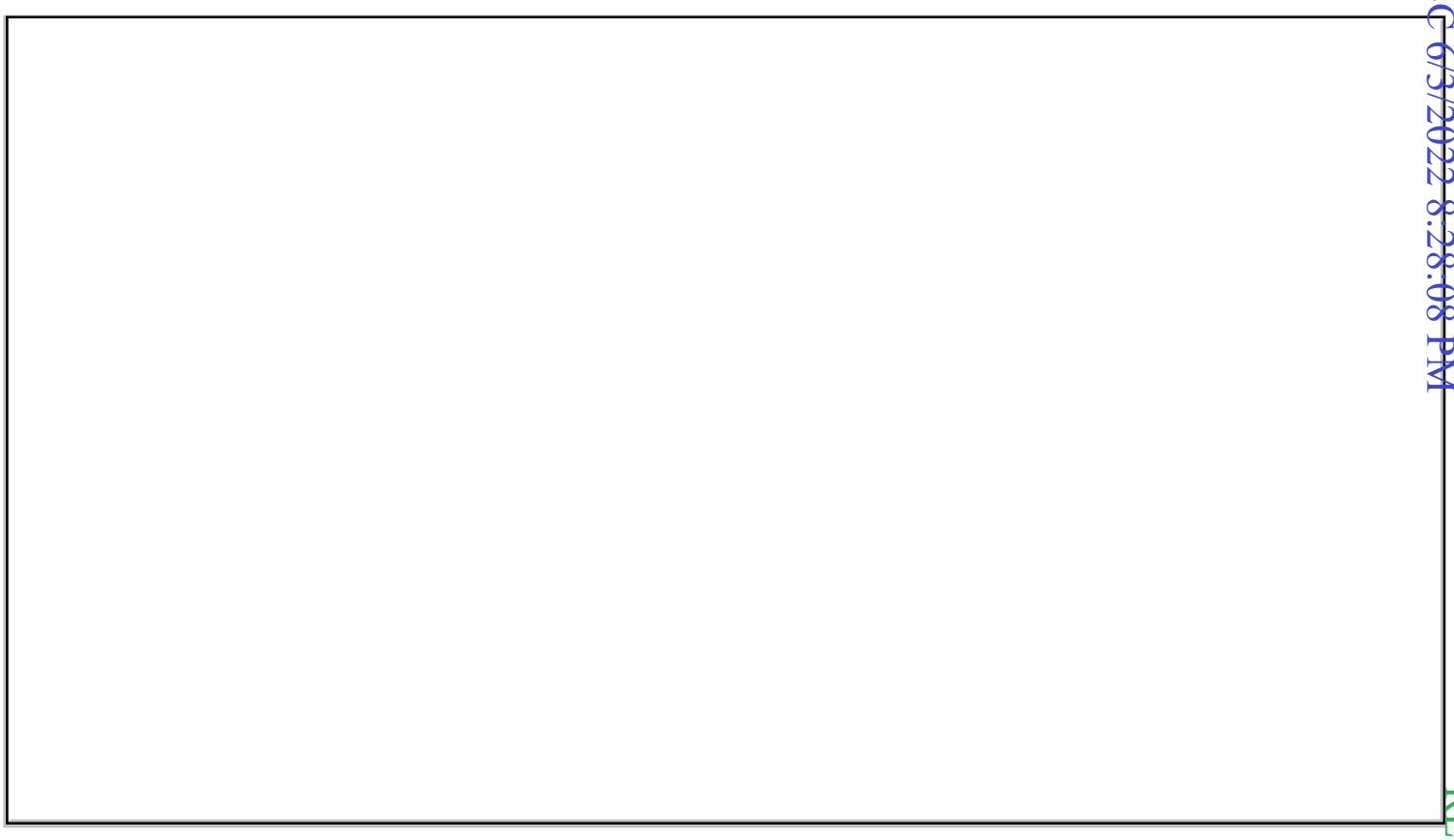
"I've had mice climb up on the bed that I'm sleeping on and that's one of the scariest things ever."

And with no air conditioning and inadequate heating, cells can get unbearably hot in the summer

months, says Perez, and freezing in the winter.

For many at Rikers though, there is a fear bigger than those posed by the rats, gangs and COs: being sent for a spell in "the box" – that is, solitary confinement.

EN NW PKG RIKERS ISLAND CLOSURE 5H



"Solitary is a different type of alone," says Mualimm-Ak, who spent six months isolated for 23 hours a day in a 10-foot by 10-foot concrete solitary confinement cell at Rikers.

"Everyone's screaming, yelling, it's just like a madhouse, a whole different world. I felt like I was alone in a crowd. It's torture."

To keep himself busy, Mualimm-Ak would draw on the walls and play solitaire with a homemade deck of cards.

"And you do that until it gets boring, then you talk to yourself until that gets boring too," he says. "After months and months of that, you end up making friends with the rats and the roaches that come into your cell."

Efforts have been made to reduce the numbers in solitary confinement in New York City facilities in

recent years, including a ban on using it as a punitive measure for those aged 21 and under.

But the practice continues, even as mental health experts have long warned of the psychological toll it can have on detainees.

"We would say in there that, even if they had no mental health issues when they came into solitary, they do now," says Mary Buser, a former assistant chief of mental health at the solitary confinement unit in Rikers, a job she held for five years before leaving in 2000.

Her team would dispense medication "by the wheelbarrow load" to help detainees cope with the side effects of solitary, such as depression and hallucinations.

Even so, they would often go to extremes to try to be taken out of solitary – including attempting suicide.

"I saw a lot of makeshift nooses," says Buser, who has since written a book, "Lockdown on Rikers", about her experience.

'The rapist next door'

Despite the litany of allegations of abuse and mistreatment, not everybody supports the idea of closing Rikers down. Among its chief critics is the main correctional officers' union in New York, the Correction Officers' Benevolent Association (COBA), which has labelled Mayor de Blasio's plans for closing Rikers a "fantasy" and a "Jedi mind trick", distracting from what it claims should be the real focus: improving safety at the jail complex.

To that end, the union has fought against efforts to limit the use of solitary confinement and argued for reversing the ban on using it for prisoners aged 21 and under.

COBA's head Elias Husamudeen has also questioned the mayor's plan to open up smaller jails in locations around New York city to replace Rikers; this will bring criminals into dangerous proximity with the city's general population, he argues.

"The guy that shot the 5-year-old, you want him in a jail next door to the mother, to the father?" he has asked. "You want him in the community, the one that raped the old lady? You want him next door?"

Meanwhile, the New York City Department of Correction – the body tasked with managing the city's system of jails, of which Rikers is by far the largest – has been implementing an extensive reform programme for the past three years aimed at increasing safety for both inmates and staff. This has included increasing the ratio of COs to inmates, training staff on the use of non-lethal force in emergency situations and installing more CCTV cameras to monitor the prison population.

Nevertheless, the department's head, Cynthia Brann, has admitted there is still much work to do.

"There are still too many officers being assaulted. There are still too many uses of force and fights. There are far too many stabbings and slashings. We must always work to do better," she told a New York City Council committee last October.

Awaiting trial

But reform, some argue, should start before an individual has even set foot inside Rikers. The "terrible injustice" of the prison complex, as psychiatrist Buser puts it, is that many of those held there may not actually be criminals at all.

Of the roughly 10,000 inmates held at Rikers daily, about 85 percent have not been convicted of a crime but are awaiting trial, either because they were not granted bail or were unable to pay it. In some cases those detained waited years for their day in court, only to be found innocent.

Buser and others believe this is a deliberate ploy to pressure the accused to accept plea bargains rather than fight to clear their names. "They know Rikers will wear you down and they know people will just cop out to anything," she says.

And it is problems like this – a lack of speedy access to trials, the bail system itself, a culture of brutality in jails – that threaten to continue to plague the justice system in New York, even after the gates of Rikers slam shut a final time, according to Busy, Perez, Mualimm-Ak and others.

"When Rikers closes, it will definitely be a day to celebrate and I will be drinking champagne on that day," says Perez. "But if we don't make the necessary policy changes that we need and the cultural shift that we need, we could see the same problems happening again, years from now."

"But they'll never be another place like Rikers."

PRISON REFORM PRISONS USA NEW YORK JUSTICE

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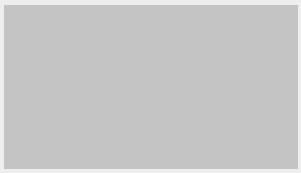

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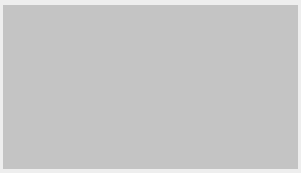

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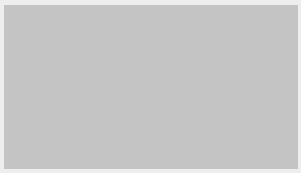

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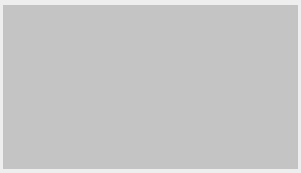

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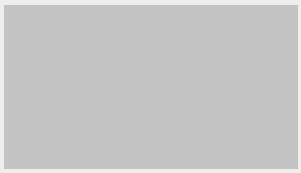

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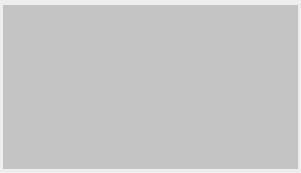

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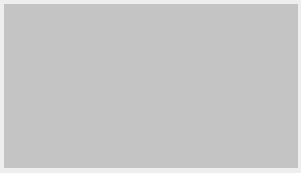

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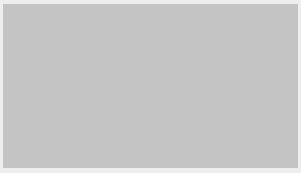

28/09/2020

Five key takeaways from the NY Times report on Trump's tax returns

ATTACHMENT 2

NEW YORK

NYC district attorneys alarmed by accounts of horrible conditions at Rikers amid coronavirus outbreak

By STEPHEN REX BROWN and CHELSIA ROSE MARCIUS
NEW YORK DAILY NEWS | APR 06, 2020

Entrance to Rikers Island. (James Keivom/New York Daily News) (James Keivom / New York Daily Ne/New York Daily News)

The city's five district attorneys are bewildered by inmate accounts of horrendous conditions at Rikers Island during the coronavirus pandemic — which, they say, raise serious questions about management of the jail complex as its population dwindles to historic lows.

Lawsuits filed by the Legal Aid Society seeking the release of more than 250 inmates describe a lack of soap and poor hygiene behind bars amid the outbreak. In one episode, an inmate reported that six other inmates were transferred out of his dorm after testing positive for coronavirus. The area had not been cleaned a day after the sick inmates were removed, according to the suit.

Yet the city's jail population has dropped by about 1,000 people since the suits were filed — making some prosecutors wonder why conditions still don't seem to be getting any better.

"Legal Aid's main contention is that the conditions at Rikers are horrendous. Our question is why? Is it a staffing issue? A resource issue? Is the only answer to release people?" a city prosecutor involved in the review of inmates proposed for release told the Daily News.

The concern, detailed in a letter signed by the district attorneys and the special narcotics prosecutor, hints at a disconnect between City Hall and law enforcement during the pandemic.

[More New York] Bigot punches, yells anti-gay slur at man recording TikTok video in NYC »

The letter suggested that the shrinking population at Rikers Island — which has dipped to about 4,500 — should mean more room to spread out and follow social distancing

“We have reviewed numerous requests for the release of individuals in New York City jails, with the goal of reducing health risks in a manner consistent with public safety," the letter read. "We are writing … to ask that you immediately reassure the public and the courts that the city’s jail system is capable of appropriately managing the health needs of the remaining inmates.”

“Even at this difficult time, our society must have the ability to safeguard those who are incarcerated, to avoid violating their rights or endangering the community. In short, we should not have to make release decisions that we know will put communities at risk,” the letter continued.

[More New York] NYC public school for students with disabilities first to close over COVID-19 cases »

One person in custody at the newly reopened Eric M. Taylor Center at Rikers — and who tested positive for coronavirus — told The News that the jails have not been sanitized and no on has taken his temperature in more than a week.

The city Correction Department “does not have a handle on the situation,” said the man, whose name is being withheld due to concerns about retaliation for speaking out. “It’s filthy, we don’t have anything to disinfect, everyone is coughing … we’re all on Death Row here.”

Elizabeth Glazer, director of the Mayor’s Office of Criminal Justice, defended the city’s efforts to ensure the safety of people behind bars — but said Correctional Health Services can only do so much to stem the outbreak.

[More New York] NYC middle and high schools buildings are open - but for many students, learning is still online »

"As the crisis rapidly evolved … city public health experts scanned the entire jailed population, no matter the reason for incarceration, prioritizing those who meet public health criteria for heightened medical vulnerabilities," she continued. "We sought [the district attorneys'] counsel to review those identified so that you could be in a position to better advise the courts and take swift steps to obtain releases where appropriate."

The city prosecutor involved in the review of inmates was troubled by the Correction Department's claims in court filings that it was complying with federal Centers for Disease Control and Prevention guidelines as it released inmates to curb the outbreak.

[More New York] Rochester cops involved in Daniel Prude's death followed training 'flawlessly,' officer's lawyer says »

Law enforcement sources have also raised concerns about public safety.

"We're talking about serious crimes committed — violent felony offenders," an NYPD source said. "This was done not in the most organized way."

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"The Department of Correction is doing everything we can to safely and humanely house people in our custody amid the broader COVID-19 crisis. Even with these efforts and the world-class medical care in our facilities, it is a simple clinical fact: public health is better served with fewer people held in our jails," department spokesman Peter Thorne said.

Board of Correction member Robert Cohen said prosecutors who question why conditions are so bad in city jails should focus instead on releasing more people.

"The district attorneys should spend their time — as I hope they are — working to get them out rather than making a judgment they know nothing about," he said. "But it's not just them. Every judge in New York should be given the names of all the people they put in Rikers Island and see who of them they could release."

With Rocco Parascandola

Topics: Rikers Island, coronavirus

New York Daily News

Stephen Rex Brown covers New York courts and criminal justice issues, with a focus on Manhattan Federal Court and Manhattan Supreme Court.

Chelsia Rose Marcius

New York Daily News

Chelsia Rose Marcius is the criminal justice reporter at the New York Daily News. She is also the author of Wild Escape: The Prison Break from Dannemora and the Manhunt that Captured America. When she's not out reporting, Chelsia teaches aspiring journalists at New York University.

Titans-Steelers game being postponed after coronavirus outbreak

NY DAILY NEWS

Michael Cohen: Trump's not on drugs, he's just 'messed up'

NY DAILY NEWS

By BRIAN NEWSDAY/RXTS DESK

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ATTACHMENT 3

A. D. No. B91-10727-119923W
S. S. No. [illegible]
B. O. No. 37

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JERRY W. MILLEGE,
Claimant/Appellant,

Court No. 92-51067-AE-5

v

HON. LEOPOLD P. BORRELLO

ROOFING MAN, INC,
Employer/Appellee,

and

MICHIGAN EMPLOYMENT
SECURITY COMMISSION,
Defendant/Appellee.
_____/

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of the State of Michigan
By: MARTIN J. VITTANDS (P26292)
Assistant Attorney General
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_____/

OPINION AND JUDGMENT FOR CLAIMANT/APPELLANT

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JERRY W. MILLEGE,

Claimant/Appellant,

File No. 92-51067-AE-5
Judge Leopold P. Borrello
P11023

v

ROOFING MAN, INC.,

Employer/Appellee

and

MICHIGAN EMPLOYMENT
SECURITY COMMISSION,

Defendant/Appellee.

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OPINION AND JUDGMENT FOR CLAIMANT/APPELLANT

This is an appeal from a final decision of the Michigan Employment Security Board of Review dated July 10, 1992. The Board of Review affirmed the decision of the hearing referee dated October 7, 1991. That decision held that the claimant/appellant was disqualified from receiving unemployment compensation benefits

beginning the week ending April 27, 1991, pursuant to Section 29(1)(f) of the Michigan Employment Security Act [MCL 421.29(1)(f); MSA 17.531(1)(f)]. This Court reverses.

The pertinent facts are not in dispute. The claimant/appellant was incarcerated for four days for failure to pay child support. He was discharged and was denied unemployment benefits pursuant to Section 29(1)(f) of the Michigan Employment Security Act [MCL 421.29(1)(f); MSA 17.531(1)(f)] which states:

> "An individual shall be disqualified for benefits in the following cases in which the individual:
>
> [(f)] Lost his or her job by reason of being absent from work as a result of a violation of law for which the individual was convicted, and sentenced to jail or prison. This subdivision shall not apply if conviction of a person results in a sentence to county jail under conditions of day parole as provided in Act No. 60 of the Public Acts of 1962, being Sections 801.251 to 801.258 of the Michigan Compiled Laws, or when the conviction was for a traffic violation that resulted in an absence of less than ten consecutive work days from the individual's place of employment."

A reviewing court may reverse a decision of the MESC only if the decision is contrary to law or if it is not supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1); MSA 17.540(1); Schultz v Oakland Co, 187 Mich App 96, 102 (1991); Clarke v North Detroit Hospital, 179 Mich App 511, 515 (1989); Grand Rapids Schools v Falkenstern, 168 Mich App 529, 536 (1988) lv app den 431 Mich 911 (1988).

Since the pertinent facts are not in dispute, this Court is reviewing the question presented as one of law. Grand Rapids Schools v Falkenstern, supra; Bowns v Port Huron, 146 Mich App 69, 74 (1985).

Disqualification provisions should be narrowly construed. Schultz v Oakland Co, supra, at 103; Johnides v St Lawrence Hospital, 184 Mich App 172, 177 (1990).

There are two different types of contempt: civil and criminal. Contempt in child support cases are civil in nature. MCL 552.631; MSA 25.164(31).

The sanctions for civil contempt are remedial in nature. They are intended to compel compliance with the court's directives by imposing a conditional sanction until the contemnor complies or no longer has the ability to comply. Sword v Sword, 399 Mich 367 (1976); Jaikins v Jaikins, 12 Mich App 115, 120 (1968).

The appellee admits that "the incarceration technically was not the result of a conviction."

The statute utilized by the MESC [Section 29(1)(f) of the Michigan Employment Security Act] to deny claimant/appellant unemployment compensation benefits does not apply to the facts of this case. The claimant/appellant was not convicted of any violation of law for which he was sentenced to jail. The statute was never intended to be applicable to civil contempt for disobeying the orders of a court.

The decision of the Michigan Employment Security Commission Board of Review is reversed, and IT IS ORDERED that the claimant/appellant receive his unemployment compensation benefits.

IT IS SO ORDERED.

Dated: March 30, 1993

LEOPOLD P. BORRELLO
CIRCUIT JUDGE

A TRUE COPY
Roland E. Nadeau Jr. Clerk

ATTACHMENT 4

Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

EEOC-CVG-2012-1

Concise Display Name:

Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

Issue Date:

04-25-2012

General Topics:

Race, Color, Sex, National Origin

Summary:

This document addresses Title VII's application to the use of arrest or conviction records in employment decisions.

Citation:

Title VII, 29 CFR Part 1601, 29 CFR Part 1606, 29 CFR Part 1607

Document Applicant:

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

Previous Revision:

Yes. This document combined and replaced 3 guidance documents from the 1980's.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

EEOC Enforcement Guidance	**Number** 915.002 **Date** 4/25/2012

1. **SUBJECT**: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq*.
2. **PURPOSE**: The purpose of this Enforcement Guidance is to consolidate and update the U.S. Equal Employment Opportunity Commission's guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*.
3. **EFFECTIVE DATE**: Upon receipt
4. **EXPIRATION DATE**: This Notice will remain in effect until rescinded or superseded.
5. **ORIGINATOR**: Office of Legal Counsel.

Consideration of Arrest and Conviction Records in Employment Decisions

Under Title VII of the Civil Rights Act of 1964[36]

Table of Contents

See Also

What You Should Know About the EEOC and Arrest and Conviction Records

Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

I. Summary

- An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.
- The Guidance builds on longstanding court decisions and existing guidance documents that the U.S. Equal Employment Opportunity Commission (Commission or EEOC) issued over twenty years ago.
- The Guidance focuses on employment discrimination based on race and national origin. The Introduction provides information about criminal records, employer practices, and Title VII.
- The Guidance discusses the differences between arrest and conviction records.
    - The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.
    - In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.
- The Guidance discusses disparate treatment and disparate impact analysis under Title VII.
    - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).
    - An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).
        - National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
        - Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:
            - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
            - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

- Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.
- State and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Guidance concludes with best practices for employers.

II. Introduction

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin.[1] This Enforcement Guidance is issued as part of the Commission's efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments.[2]

In the last twenty years, there has been a significant increase in the number of Americans who have had contact[3] with the criminal justice system[4] and, concomitantly, a major increase in the number of people with criminal records in the working-age population.[5] In 1991, only 1.8% of the adult population had served time in prison.[6] After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults).[7] By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail.[8] The Department of Justice's Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.[9]

Arrest and incarceration rates are particularly high for African American and Hispanic men.[10] African Americans and Hispanics[11] are arrested at a rate that is 2 to 3 times their proportion of the general population.[12] Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime;[13] by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.[14]

The Commission, which has enforced Title VII since it became effective in 1965, has well-established guidance applying Title VII principles to employers' use of criminal records to screen for employment.[15] This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers' increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments,[16] the Commission has decided to update and consolidate in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions. Thus, this Enforcement Guidance will supersede the Commission's previous policy statements on this issue.

The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

III. Background

The contextual framework for the Title VII analysis in this Enforcement Guidance includes how criminal record information is collected and recorded, why employers use criminal records, and the EEOC's interest in such criminal record screening.

A. Criminal History Records

Criminal history information can be obtained from a wide variety of sources including, but not limited to, the following:

- Court Records. Courthouses maintain records relating to criminal charges and convictions, including arraignments, trials, pleas, and other dispositions.[17] Searching county courthouse records typically provides the most complete criminal history.[18] Many county courthouse records must be retrieved on-site,[19] but some courthouses offer their records online.[20] Information about federal crimes such as interstate drug trafficking, financial fraud, bank robbery, and crimes against the government may be found online in federal court records by searching the federal courts' Public Access to Court Electronic Records or Case Management/Electronic Case Files.[21]
- Law Enforcement and Corrections Agency Records. Law enforcement agencies such as state police agencies and corrections agencies may allow the public to access their records, including records of complaints, investigations, arrests, indictments, and periods of incarceration, probation, and parole.[22] Each agency may differ with respect to how and where the records may be searched, and whether they are indexed.[23]
- Registries or Watch Lists. Some government entities maintain publicly available lists of individuals who have been convicted of, or are suspected of having committed, a certain type of crime. Examples of such lists include state and federal sex offender registries and lists of individuals with outstanding warrants.[24]
- State Criminal Record Repositories. Most states maintain their own centralized repositories of criminal records, which include records that are submitted by most or all of their criminal justice agencies, including their county courthouses.[25] States differ with respect to the types of records included in the repository,[26] the completeness of the records,[27] the frequency with which they are updated,[28] and whether they permit the public to search the records by name, by fingerprint, or both.[29] Some states permit employers (or third-parties acting on their behalf) to access these records, often for a fee.[30] Others limit access to certain types of records,[31] and still others deny access altogether.[32]

- The Interstate Identification Index (III). The Federal Bureau of Investigation (FBI) maintains the most comprehensive collection of criminal records in the nation, called the "Interstate Identification Index" (III). The III database compiles records from each of the state repositories, as well as records from federal and international criminal justice agencies.[33]

  The FBI's III database may be accessed for employment purposes by:

  - the federal government;[34]
  - employers in certain industries that are regulated by the federal government, such as "the banking, nursing home, securities, nuclear energy, and private security guard industries; as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers";[35] and
  - employers in certain industries "that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions."[36]

Recent studies have found that a significant number of state and federal criminal record databases include incomplete criminal records.

- A 2011 study by the DOJ/BJS reported that, as of 2010, many state criminal history record repositories still had not recorded the final dispositions for a significant number of arrests.[37]

- A 2006 study by the DOJ/BJS found that only 50% of arrest records in the FBI's III database were associated with a final disposition. [38]

Additionally, reports have documented that criminal records may be inaccurate.

- One report found that even if public access to criminal records has been restricted by a court order to seal and/or expunge such records, this does not guarantee that private companies also will purge the information from their systems or that the event will be erased from media archives.[39]

- Another report found that criminal background checks may produce inaccurate results because criminal records may lack "unique" information or because of "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities."[40]

Employers performing background checks to screen applicants or employees may attempt to search these governmental sources themselves or conduct a simple Internet search, but they often rely on third-party background screening businesses.[41] Businesses that sell criminal history information to employers are "consumer reporting agencies" (CRAs)[42] if they provide the information in "consumer reports"[43] under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (FCRA). Under FCRA, a CRA generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago.[44] However, they may report convictions indefinitely.[45]

CRAs often maintain their own proprietary databases that compile information from various sources, such as those described above, depending on the extent to which the business has purchased or otherwise obtained access to data.[46] Such databases vary with respect to the geographic area covered, the type of information included (e.g., information about arrests, convictions, prison terms, or specialized information for a subset of employers such as information about workplace theft or shoplifting cases for retail employers[47]), the sources of information used (e.g., county databases, law enforcement agency records, sex offender registries), and the frequency with which they are updated. They also may be missing certain types of disposition information, such as updated convictions, sealing or expungement orders, or orders for entry into a diversion program.[48]

B. Employers' Use of Criminal History Information

In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks.[49] Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud,[50] as well as heightened concerns about workplace violence[51] and potential liability for negligent hiring.[52] Employers also cite federal laws as well as state and local laws[53] as reasons for using criminal background checks.

C. The EEOC's Interest in Employers' Use of Criminal Records in Employment Screening

The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. Title VII liability for employment discrimination is determined using two analytic frameworks: "disparate treatment" and "disparate impact." Disparate treatment is discussed in Section IV and disparate impact is discussed in Section V.

IV. Disparate Treatment Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or another protected basis.[54] For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.[55]

Example 1: Disparate Treatment Based on Race. John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.

After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer "these drug dealer types" to client companies. However, the same representative refers John for an interview, asserting that John's youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.

Title VII prohibits "not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking . . . ."[56] Thus, an employer's decision to reject a job applicant based on racial or ethnic stereotypes about criminality - rather than qualifications and suitability for the position - is unlawful disparate treatment that violates Title VII.[57]

Example 2: Disparate Treatment Based on National Origin. Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school's computer system over the course of several months without authorization and changing his classmates' grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson's and Tad's educational backgrounds are similar, that Nelson's work experience is more extensive, and that Tad's criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC's investigation confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.

There are several kinds of evidence that may be used to establish that race, national origin, or other protected characteristics motivated an employer's use of criminal records in a selection decision, including, but not limited to:

- Biased statements. Comments by the employer or decisionmaker that are derogatory with respect to the charging party's protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant's or employee's criminal record.

- Inconsistencies in the hiring process. Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.

- Similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group). Comparators may include people in similar positions, former employees, and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party's protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.

- Employment testing. Matched-pair testing may reveal that candidates are being treated differently because of a protected status.[58]

- Statistical evidence. Statistical analysis derived from an examination of the employer's applicant data, workforce data, and/or third party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

V. Disparate Impact Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.[59]

In its 1971 *Griggs v. Duke Power Company* decision, the Supreme Court first recognized that Title VII permits disparate impact claims.[60] The *Griggs* Court explained that "[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited."[61] In 1991, Congress amended Title VII to codify this analysis of discrimination and its burdens of proof.[62] Title VII, as amended, states:

> An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .[63]

With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

A. Determining Disparate Impact of Policies or Practices that Screen Individuals Based on Records of Criminal Conduct

1. Identifying the Policy or Practice

The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal conduct exclusions, relevant information includes the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented. More specifically, such information also includes which offenses or classes of offenses were reported to the employer (e.g., all felonies, all drug offenses); whether convictions (including sealed and/or expunged convictions), arrests, charges, or other criminal incidents were reported; how far back in time the reports reached (e.g., the last five, ten, or twenty years); and the jobs for which the criminal background screening was conducted.[64] Training or guidance documents used by the employer also are relevant, because they may specify which types of criminal history information to gather for particular jobs, how to gather the data, and how to evaluate the information after it is obtained.

2. Determining Disparate Impact

Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans,[65] even though African Americans only comprised approximately 14% of the general population.[66] In 2008, Hispanics were arrested for federal drug charges at a rate of

approximately three times their proportion of the general population.[67] Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.[68]

African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged.[69] This rate climbs to 1 in 6 (or 17.2%) for Hispanic men.[70] For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%).[71] Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites,[72] and 7 states had a Black-to-White ratio of incarceration that was 10 to1.[73] In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men.[74]

National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During an EEOC investigation, the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact. The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures,[75] workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics.[76]

An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact. In *Connecticut v. Teal*, the Supreme Court held that a "bottom line" racial balance in the workforce does not preclude employees from establishing a prima facie case of disparate impact; nor does it provide employers with a defense.[77] The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.[78]

Finally, in determining disparate impact, the Commission will assess the probative value of an employer's applicant data. As the Supreme Court stated in *Dothard v. Rawlinson*, an employer's "application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying" because of an alleged discriminatory policy or practice.[79] Therefore, the Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records. Relevant evidence may come from ex-offender employment programs, individual testimony, employer statements, evidence of employer recruitment practices, or publicly posted notices, among other sources.[80] The Commission will determine the persuasiveness of such evidence on a case-by-case basis.

B. Job Related For the Position in Question and Consistent with Business Necessity

1. Generally

After the plaintiff in litigation establishes disparate impact, Title VII shifts the burdens of production and persuasion to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[81] In the legislative history of the 1991 Civil Rights Act, Congress referred to *Griggs* and its progeny such as *Albemarle Paper Company v. Moody*[82] and *Dothard*[83] to explain how this standard should be construed.[84] The *Griggs* Court stated that the employer's burden was to show that the policy or practice is one that "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract."[85] In both *Albemarle*[86] and *Dothard*,[87] the Court emphasized the factual nature of the business

necessity inquiry. The Court further stated in *Dothard* that the terms of the exclusionary policy must "be shown to be necessary to safe and efficient job performance."[88]

In a case involving a criminal record exclusion, the Eighth Circuit in its 1975 *Green v. Missouri Pacific Railroad* decision, held that it was discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense."[89] The Eighth Circuit identified three factors (the "*Green* factors") that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct;[90]
- The time that has passed since the offense or conduct and/or completion of the sentence; [91] and
- The nature of the job held or sought.[92]

In 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*[93] developed the statutory analysis in greater depth. Douglas El challenged SEPTA's policy of excluding everyone ever convicted of a violent crime from the job of paratransit driver.[94] El, a 55 year-old African American paratransit driver-trainee, was terminated from employment when SEPTA learned of his conviction for second-degree murder 40 years earlier; the conviction involved a gang fight when he was 15 years old and was his only disqualifying offense under SEPTA's policy.[95] The Third Circuit expressed "reservations" about a policy such as SEPTA's (exclusion for all violent crimes, no matter how long ago they were committed) "in the abstract."[96]

Applying Supreme Court precedent, the *El* court observed that some level of risk is inevitable in all hiring, and that, "[i]n a broad sense, hiring policies . . . ultimately concern the management of risk."[97] Recognizing that assessing such risk is at the heart of criminal record exclusions, the Third Circuit concluded that Title VII requires employers to justify criminal record exclusions by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not."[98]

The Third Circuit affirmed summary judgment for SEPTA, but stated that the outcome of the case might have been different if Mr. El had, "for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, . . . [so] there would be a factual question for the jury to resolve."[99] The Third Circuit reasoned, however, that the recidivism evidence presented by SEPTA's experts, in conjunction with the nature of the position at issue - paratransit driver-trainee with unsupervised access to vulnerable adults - required the employer to exercise the utmost care.[100]

In the subsections below, the Commission discusses considerations that are relevant to assessing whether criminal record exclusion policies or practices are job related and consistent with business necessity. First, we emphasize that arrests and convictions are treated differently.

2. Arrests

The fact of an arrest does not establish that criminal conduct has occurred.[101] Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed.[102] Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.[103]

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.

Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A., *supra*, the DOJ/BJS reported that many arrest records in the FBI's III database and state criminal record repositories are not associated with final dispositions.[104] Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.[105]

Example 3: Arrest Record Is Not Grounds for Exclusion. Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply "driving while Black," the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department's database and is reported in a background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.

Example 4: Employer's Inquiry into Conduct Underlying Arrest. Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.

Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

3. Convictions

By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas.[106] However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor.[107]

Some states require employers to wait until late in the selection process to ask about convictions.[108] The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience.[109] As a best practice, and

consistent with applicable laws,[110] the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

4. Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); [111] or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity. *See* Section V.B.9, *infra* (examples of relevant considerations in individualized assessments).

Depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

5. Validation

The Uniform Guidelines describe three different approaches to validating employment screens.[112] However, they recognize that "[t]here are circumstances in which a user cannot or need not utilize" formal validation techniques and that in such circumstances an employer "should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact as set forth [in the following subsections]."[113] Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications,[114] and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.

6. Detailed Discussion of the *Green* Factors and Criminal Conduct Screens

Absent a validation study that meets the Uniform Guidelines' standards, the *Green* factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions. The three *Green* factors are:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

a. The Nature and Gravity of the Offense or Conduct

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation.[115] With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence

Employer policies typically specify the duration of a criminal conduct exclusion. While the *Green* court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.[116] Subsequently, in *El*, the court noted that the plaintiff might have survived summary judgment if he had presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person . . . ."[117] Thus, the court recognized that the amount of time that had passed since the plaintiff's criminal conduct occurred was probative of the risk he posed in the position in question.

Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.[118]

c. The Nature of the Job Held or Sought

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[119]

7. Examples of Criminal Conduct Exclusions that Do Not Consider the *Green* Factors

A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions. As the court recognized in *Green*, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[120]

Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity. The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant

answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."

The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.

Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity. Leo, an African American man, has worked successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo's positive employment history at PR Agency.

Leo files a Title VII charge alleging that PR Agency's conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency's defense that it employs only the "best of the best" for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the *Green* factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency's policy is not job related for the position in question and consistent with business necessity. [121]

8. Targeted Exclusions that Are Guided by the *Green* Factors

An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

As discussed above in Section V.B.4, depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

9. Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison; [122]
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct; [123]
- Rehabilitation efforts, e.g., education/training; [124]
- Employment or character references and any other information regarding fitness for the particular position;[125] and
- Whether the individual is bonded under a federal, state, or local bonding program.[126]

If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity. County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration. This rule was adopted by the County's Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a "second chance" to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County's concerns.

Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity. [127]

Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity. "Shred 4 You" employs over 100 people to pick up discarded files and sensitive materials from offices, transport

the materials to a secure facility, and shred and recycle them. The owner of "Shred 4 You" sells the company to a competitor, known as "We Shred." Employees of "Shred 4 You" must reapply for employment with "We Shred" and undergo a background check. "We Shred" has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Jamie, who is African American, worked successfully for "Shred 4 You" for five years before the company changed ownership. Jamie applies for his old job, and "We Shred" reviews Jamie's performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when "We Shred" does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. "We Shred" management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks management to consider his reliable and honest performance in the same job at "Shred 4 You," but "We Shred" refuses to do so. The employer's conclusion that Jamie's guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie's history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.

C. Less Discriminatory Alternatives

If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt.[128]

VI. Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. However, the EEOC will continue to coordinate with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions.[129]

A. Hiring in Certain Industries

Federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions in both the private and public sectors. For example, federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport.[130] There are equivalent requirements for federal law enforcement officers,[131] child care workers in federal agencies or facilities,[132] bank employees, [133] and port workers,[134] among other positions.[135] Title VII does not preempt these federally imposed restrictions. However, if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.

Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity. Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in

positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.

Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank's policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have "100% confidence" that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years. After establishing that the Bank's policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank's justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.

B. Obtaining Occupational Licenses

Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry,[136] the financial industry,[137] and import/export activities,[138] among others.[139]

C. Waiving or Appealing Federally Imposed Occupational Restrictions

Several federal statutes and regulations provide a mechanism for employers or individuals to appeal or apply for waivers of federally imposed occupational restrictions. For example, unless a bank receives prior written consent from the Federal Deposit Insurance Corporation (FDIC), an individual convicted of a criminal offense involving dishonesty, breach of trust, money laundering, or another financially related crime may not work in, own, or control "an insured depository institution" (e.g., bank) for ten years under the Federal Deposit Insurance Act.[140] To obtain such FDIC consent, the insured institution must file an application for a waiver on behalf of the particular individual.[141] Alternatively, if the insured institution does not apply for the waiver on the individual's behalf, the individual may file a request directly with the FDIC for a waiver of the institution filing requirement, demonstrating "substantial good cause" to grant the waiver.[142] If the FDIC grants the individual's waiver request, the individual can then file an application directly with the FDIC for consent to work for the insured institution in question.[143] Once the institution, or the individual, submits the application, the FDIC's criminal record waiver review process requires consideration of mitigating factors that are consistent with Title VII, including evidence of rehabilitation, and the nature and circumstances of the crime.[144]

Additionally, port workers who are denied the Transportation Workers Identification Credential (TWIC) based on their conviction record may seek a waiver for certain permanently disqualifying offenses or interim disqualifying offenses, and also may file an individualized appeal from the Transportation Security Administration's initial determination of threat assessment based on the conviction.[145] The Maritime Transportation Security Act, which requires all port workers to undergo a criminal background check to obtain a TWIC,[146] provides that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism are permanently disqualified from obtaining credentials, but those with convictions for firearms violations and distribution of controlled substances may be temporarily disqualified.[147] Most offenses related to dishonesty are only temporarily disqualifying.[148]

Example 10: Consideration of Federally Imposed Occupational Restrictions. John Doe applies for a position as a truck driver for Truckers USA. John's duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in

their background as defined by federal law. After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law.[149] John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property. TSA refuses to grant John's waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA's waiver procedures.[150] Based on this denial, Truckers USA rejects John's application for the port truck driver position. Title VII does not override Truckers USA's policy because the policy is consistent with another federal law.

While Title VII does not mandate that an employer seek such waivers, where an employer does seek waivers it must do so in a nondiscriminatory manner.

D. Security Clearances

The existence of a criminal record may result in the denial of a federal security clearance, which is a prerequisite for a variety of positions with the federal government and federal government contractors.[151] A federal security clearance is used to ensure employees' trustworthiness, reliability, and loyalty before providing them with access to sensitive national security information.[152] Under Title VII's national security exception, it is not unlawful for an employer to "fail or refuse to hire and employ" an individual because "such individual has not fulfilled or has ceased to fulfill" the federal security requirements.[153] This exception focuses on whether the position in question is, in fact, subject to national security requirements that are imposed by federal statute or Executive Order, and whether the adverse employment action actually resulted from the denial or revocation of a security clearance.[154] Procedural requirements related to security clearances must be followed without regard to an individual's race, color, religion, sex, or national origin.[155]

E. Working for the Federal Government

Title VII provides that, with limited coverage exceptions, "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[156] The principles discussed above in this Guidance apply in the federal employment context. In most circumstances, individuals with criminal records are not automatically barred from working for the federal government.[157] However, the federal government imposes criminal record restrictions on its workforce through "suitability" requirements for certain positions.[158] The federal government's Office of Personnel Management (OPM) defines suitability as "determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service."[159] Under OPM's rules, agencies may bar individuals from federal employment for up to three years if they are found unsuitable based on criminal or dishonest conduct, among other factors.[160] OPM gives federal agencies the discretion to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position.[161] These mitigating criteria, which are consistent with the three *Green* factors and also provide an individualized assessment of the applicant's background, allow consideration of: (1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation.[162] In general, OPM requires federal agencies and departments to consider hiring an individual with a criminal record if he is the best candidate for the position in question and can comply with relevant job requirements.[163] The EEOC continues to coordinate with OPM to achieve employer best practices in the federal sector.[164]

VII. Positions Subject to State and Local Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct.[165] Unlike federal laws or regulations, however, state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.[166] Therefore, if an employer's exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.[167]

Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity. Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.

Example 12: State Law Exclusion Is Not Consistent with Title VII. County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris's application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y's law "purports to require or permit the doing of an[] act which would be an unlawful employment practice" under Title VII.

VIII. Employer Best Practices

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
    - Identify essential job requirements and the actual circumstances under which the jobs are performed.
    - Determine the specific offenses that may demonstrate unfitness for performing such jobs.

        - Identify the criminal offenses based on all available evidence.
    - Determine the duration of exclusions for criminal conduct based on all available evidence.
        - Include an individualized assessment.
    - Record the justification for the policy and procedures.
    - Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

Approved by the Commission:

/s/

_____

Chair Jacqueline A. Berrien

4/25/2010

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Date

ENDNOTES

1 42 U.S.C. § 2000e *et seq*. The EEOC also enforces other anti-discrimination laws including: Title I of the Americans with Disabilities Act of 1990, as amended (ADA), and Section 501 of the Rehabilitation Act, as amended, which prohibit employment discrimination on the basis of disability; the Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits discrimination on the basis of age 40 or above; Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination on the basis of genetic information; and the Equal Pay Act of 1963, as amended (EPA), which requires employers to pay male and female employees at the same establishment equal wages for equal work.

2 All entities covered by Title VII are subject to this analysis. *See* 42 U.S.C. § 2000e-2 (anti-discrimination provisions); 42 U.S.C. § 2000e(b)""(e) (defining "employer," "employment agency," and "labor organization"); 42 U.S.C. § 2000e-16(a) (prohibiting discriminatory employment practices by federal departments and agencies). For purposes of this Guidance, the term "employer" is used in lieu of listing all Title VII-covered entities. The Commission considers other coverage questions that arise in particular charges involving, for example, joint employment or third party interference in *Compliance Manual Section 2: Threshold Issues,* U.S. Equal Emp't Opportunity Comm'n, § 2-III B., *Covered Entities*, http://www.eeoc.gov/policy/docs/threshold.html#2-III-B (last visited April 23, 2012).

3 For the purposes of this Guidance, references to "contact" with the criminal justice system may include, for example, an arrest, charge, indictment, citation, conviction, incarceration, probation, or parole.

4 *See* Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, Prevalence of Imprisonment in the U.S. Population, 1974""2001, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter Prevalence of Imprisonment] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); Sean Rosenmerkel et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Sentences in State Courts, 2006 "" Statistical Tables 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); *see also* Pew Ctr. on The States, One in 31: The Long Reach of American Corrections 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter One in 31] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . .[bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); Pew Ctr. on the States, One in 100: Behind Bars in America 2008, at 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf ("[M]ore than one in every 100 adults is now confined in an American jail or prison."); Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 Pediatrics 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

5 *See* John Schmitt & Kris Warner, Ctr. For Econ. & Policy Research, Ex-Offenders and the Labor Market 12 (2010), www.cepr.net/documents/publications/ex-offenders-2010-11.pdf ("In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms]."); *see id.* at 3 (concluding that "in the absence of some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").

6 Prevalence of Imprisonment, *supra* note 4, at 4, Table 3.

7 *Id.*

8 One in 31, *supra* note 8, at 5 (noting that when all of the individuals who are probationers, parolees, prisoners or jail inmates are added up, the total is more than 7.3 million adults; this is more than the populations of Chicago, Philadelphia, San Diego, and Dallas combined, and larger than the populations of 38 states and the District of Columbia).

9 Prevalence of Imprisonment, *supra* note 4, at 7.

10 *Id.* at 5, Table 5; *cf.* Pew Ctr. on the States, Collateral Costs: Incarceration's Effect on Economic Mobility 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12."). Incarceration rates are even starker for 20-to-34-year-old men without a high school diploma or GED: 1 in 8 White males in this demographic group is incarcerated, compared to 1 in 14 Hispanic males, and 1 in 3 Black males. Pew Ctr. on the States, *supra*, at 8, Figure 2.

11 This document uses the terms "Black" and "African American," and the terms "Hispanic" and "Latino," interchangeably.

12 *See infra* notes 65-67 (citing data for the arrest rates and population statistics for African Americans and Hispanics).

13 Prevalence of Imprisonment, *supra* note 4, at 1.

14 *Id.* at 8.

15 *See Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp't Opportunity Comm'n (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html; *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, U.S. Equal Emp't Opportunity Comm'n (July 29, 1987), http://www.eeoc.gov/policy/docs/convict2.html; *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, U.S. Equal Emp't Opportunity Comm'n (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html; *Compliance Manual Section 15: Race & Color Discrimination*, U.S. Equal Emp't Opportunity Comm'n, § 15-VI.B.2 (April 19, 2006), http://www.eeoc.gov/policy/docs/race-color.pdf. *See also* EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

16 In 2011, U.S. Attorney General Eric Holder assembled a Cabinet-level interagency Reentry Council to support the federal government's efforts to promote the successful reintegration of ex-offenders back into their communities. *National Reentry Resource Center "" Federal Interagency Reentry Council*, http://www.nationalreentryresourcecenter.org/reentry-council (last visited April 23, 2012). As a part of the Council's efforts, it has focused on removing barriers to employment for ex-offenders to reduce recidivism by publishing several fact sheets on employing individuals with criminal records. *See, e.g.*, Fed. Interagency Reentry Council, Reentry Mythbuster! on Federal Hiring Policies (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1083/Reentry_Council_Mythbuster_Fed_Employment.pdf; Fed. Interagency Reentry Council, Reentry Mythbuster! on Hiring/Criminal Records Guidance (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf; Fed. Interagency Reentry Council, Reentry Mythbuster! Criminal Histories and Employment Background Checks (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1176/Reentry_Council_Mythbuster_FCRA_Employment.pdf; Fed. Interagency Reentry Council, Reentry Mythbuster! on Federal Bonding Program (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1061/Reentry_Council_Mythbuster_Federal_Bonding.pdf.

In addition to these federal efforts, several state law enforcement agencies have embraced initiatives and programs that encourage the employment of ex-offenders. For example, Texas' Department of Criminal Justice has a Reentry and

Integration Division and within that Division, a Reentry Task Force Workgroup. *See Reentry and Integration Division-Reentry Task Force*, Tex. Dep't of Criminal Justice, http://www.tdcj.state.tx.us/divisions/rid/rid_texas_reentry_task_force.html (last visited April 23, 2012). One of the Workgroups in this Task Force specifically focuses on identifying employment opportunities for ex-offenders and barriers that affect ex-offenders' access to employment or vocational training programs. *Reentry and Integration Division "" Reentry Task Force Workgroups*, Tex. Dep't of Criminal Justice, http://www.tdcj.state.tx.us/divisions/rid/r_workgroup/rid_workgroup_employment.html (last visited April 23, 2012). Similarly, Ohio's Department of Rehabilitation and Correction has an Offender Workforce Development Office that "works with departmental staff and correctional institutions within the Ohio Department of Rehabilitation and Correction to prepare offenders for employment and the job search process." *Jobs for Ohio Offenders*, Ohio Dep't of Rehab. and Corr. Offender Workforce Dev., http://www.drc.ohio.gov/web/JOBOFFEN.HTM (last updated Aug. 9, 2010). Law enforcement agencies in other states such as Indiana and Florida have also recognized the importance of encouraging ex-offender employment. *See, e.g.*, *IDOC: Road to Re-Entry*, Ind. Dep't of Corr., http://www.in.gov/idoc/reentry/index.htm (last visited April 23, 2012) (describing various services and programs that are available to ex-offenders to help them to obtain employment); Fla. Dep't of Corrs., Recidivism Reduction Strategic Plan: Fiscal Year 2009-2014, at 11, 12 (2009), http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (identifying the lack of employment as one of the barriers to successful ex-offender reentry).

17 Carl R. Ernst & Les Rosen, "National" Criminal History Databases 1 (2002), http://www.brbpub.com/articles/CriminalHistoryDB.pdf.

18 LexisNexis, Criminal Background Checks: What Non-profits Need to Know About Criminal Records 4 (2009), http://www.lexisnexis.com/risk/nonprofit/documents/Volunteer_Screening_White_Paper.pdf.

19 *Id.*

20 Ernst & Rosen, *supra* note 17, at 1; Nat'l Ass'n of Prof'l Background Screeners, Criminal Background Checks for Employment Purposes 5, http://www.napbs.com/files/public/Learn_More/White_Papers/CriminalBackgroundChecks.pdf.

21 LexisNexis, *supra* note 18, at 6. *See also* Nat'l Ass'n of Prof'l Background Screeners, *supra* note 20 at 5.

22 Ernst & Rosen, *supra* note 17, at 1.

23 *Id.*

24 *See* SEARCH, The National Task Force on the Criminal Backgrounding of America 3, 4 (2005), http://www.search.org/files/pdf/ReportofNTFCBA.pdf. Registries and watch lists can also include federal and international terrorist watch lists, and registries of individuals who are being investigated for certain types of crimes, such as gang-related crimes. *Id. See also* LexisNexis, *supra* note 18, at 5 (reporting that "all 50 states currently have a publicly available sex offender registry").

25 *See* U.S. Dep't of Justice, The Attorney General's Report on Criminal History Background Checks 4 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf [hereinafter Background Checks]. *See also* Ernst & Rosen, *supra* note 17, at 2.

26 *See* Nat'l Ass'n of Prof'l Background Screeners, *supra* note 20, at 5. *See also* LexisNexis, *supra* note 18, at 5.

27 LexisNexis, *supra* note 18, at 5. *See also* Am. Ass'n of Colls. of Pharmacy, Report of the AACP Criminal Background Check Advisory Panel 6""7 (2006), http://www.aacp.org/resources/academicpolicies/admissionsguidelines/Documents/AACPBackgroundChkRpt.pdf.

28 Am. Ass'n of Colls. of Pharmacy, *supra* note 27, at 6""7.

29 Background Checks, *supra* note 25, at 4.

30 *Id.*

31 Nat'l Ass'n of Prof'l Background Screeners, *supra* note 20, at 5.

32 Background Checks, *supra* note 25, at 4.

33 *Id.* at 3.

34 *See id.* ("Non-criminal justice screening using FBI criminal history records is typically done by a government agency applying suitability criteria that have been established by law or the responsible agency.").

35 *Id.* at 5.

36 *Id.* at 4.

37 Dennis A. DeBacco & Owen M. Greenspan, Bureau of Justice Statistics, U.S. Dep't of Justice, Survey of State Criminal History Information Systems, 2010, at 2 (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf [hereinafter State Criminal History].

38 *See* Background Checks, *supra* note 25, at 17.

39 SEARCH, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information 83 (2005), www.search.org/files/pdf/RNTFCSCJRI.pdf; *see also* Douglas Belkin, *More Job Seekers Scramble to Erase Their Criminal Past*, Wall St. J., Nov. 11, 2009, at A1, *available at* http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin ("Arrests that have been legally expunged may remain on databases that data-harvesting companies offer to prospective employers; such background companies are under no legal obligation to erase them.").

If applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. *See generally* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1509""10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

40 *See* SEARCH, Interstate Identification Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General 21""22 (1999), www.search.org/files/pdf/III_Name_Check.pdf ("A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers."); *id.* at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were *inaccurately* indicated by a "name check" to have criminal records, which represents approximately 5.5% of the overall sample).

41 Background Checks, *supra* note 25, at 2.

42 A "consumer reporting agency" is defined by FCRA as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information *or other information* on consumers for the purposes of furnishing consumer reports to third parties . . . ." 15 U.S.C. § 1681a(f) (emphasis added); *see also* Background Checks, *supra* note 25, at 43 (stating that the records that CRAs collect include "criminal history information, such as arrest and conviction information").

43 A "consumer report" is defined by FCRA as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics*, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes . . . ." 15 U.S.C. § 1681a(d)(1) (emphasis added).

44 *See* 15 U.S.C. § 1681c(a)(2) ("[N]o consumer reporting agency may make any consumer report containing . . . records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period."). *But see id.* §1681c(b)(3) (stating that the reporting restrictions for arrest records do not apply to individuals who will earn "an annual salary which equals, or which may reasonably be expected to equal $75,000 or more").

45 15 U.S.C. § 1681c(a)(5) ("[N]o consumer reporting agency may make any consumer report containing . . . [a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.").

46 Background Checks, *supra* note 25, at 2.

47 *See* Adam Klein, *Written Testimony of Adam Klein*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm (last visited April 23, 2012) (describing how "several data-collection agencies also market and sell a retail-theft contributory database that is used by prospective employers to screen applicants"). *See also Retail Theft Database, ESTEEM, Workplace Theft Contributory Database*, LexisNexis, http://www.lexisnexis.com/risk/solutions/retail-theft-contributory-database.aspx (last visited April 23, 2012) (stating that their database has "[t]heft and shoplifting cases supplied by more than 75,000 business locations across the country"). These databases may contain inaccurate and/or misleading information about applicants and/or employees. *See generally* Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 2:11-CV-2950-JD, 2012 WL 975043 (E.D. Pa. Mar. 22, 2012) (unpublished).

48 Background Checks, *supra* note 25, at 2.

49 Soc'y for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks, slide 3 (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal?from=share_email [hereinafter Conducting Criminal Background Checks] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the "not sure" responses from its analysis, which may account for the 1% gap in the total number of employer responses. *Id.*

50 Conducting Criminal Background Checks, *supra* note 49, at slide 7 (39% of the surveyed employers reported that they conducted criminal background checks "[t]o reduce/prevent theft and embezzlement, other criminal activity"); *see also* Sarah E. Needleman, *Businesses Say Theft by Their Workers is Up*, Wall St. J., Dec. 11, 2008, at B8, *available at* http://online.wsj.com/article/SB122896381748896999.html.

51 Conducting Criminal Background Checks, *supra* note 49, at slide 7 (61% of the surveyed employers reported that they conducted criminal background checks "[to] ensure a safe work environment for employees"); *see also* Erika Harrell, Bureau of Justice Statistics, U.S. Dep't of Justice, Workplace Violence, 1993""2009, at 1 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf (reporting that in 2009, "[n]onfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older"). *But see id.* (noting that from "2002 to 2009, the rate of nonfatal workplace violence has declined by 35%, following a 62% decline in the rate from 1993 to 2002"). Studies indicate that most workplace violence is committed by individuals with no relationship to the business or its employees. *See id.* at 6

(reporting that between 2005 and 2009, strangers committed the majority of workplace violence against individuals (53% for males and 41% for females) while violence committed by co-workers accounted for a much smaller percentage (16.3% for males and 14.3% for females)); *see also* Nat'l Inst. for Occupational Safety & Health, Ctr. for Disease Control & Prevention, Workplace Violence Prevention Strategies and Research Needs 4, Table 1 (2006), http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf (reporting that approximately 85% of the workplace homicides examined were perpetrated in furtherance of a crime by persons with no relationship to the business or its employees; approximately 7% were perpetrated by employees or former employees, 5% were committed by persons with a personal relationship to an employee, and 3% were perpetrated by persons with a customer-client relationship to the business).

52 Conducting Criminal Background Checks, *supra* note 49, at slide 7 (55% percent of the surveyed employers reported that they conducted criminal background checks "[t]o reduce legal liability for negligent hiring"). Employers have a common law duty to exercise reasonable care in hiring to avoid foreseeable risks of harm to employees, customers, and the public. If an employee engages in harmful misconduct on the job, and the employer has not exercised such care in selecting the employee, the employer may be subject to liability for negligent hiring. *See, e.g.*, Stires v. Carnival Corp., 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) ("[N]egligent hiring occurs when . . . the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.").

53 Conducting Criminal Background Checks, *supra* note 49, at slide 4 (40% of the surveyed employers reported that they conducted criminal background checks for "[j]ob candidates for positions for which state law requires a background check (e.g., day care teachers, licensed medical practitioners, etc.)"); *see id.* at slide 7 (20% of the employers reported that they conducted criminal background checks "[t]o comply with the applicable State law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position"). The study did not report the exact percentage of employers that conducted criminal background checks to comply with applicable federal laws or regulations, but it did report that 25% of the employers conducted background checks for "[j]ob candidates for positions involving national defense or homeland security." *Id.* at slide 4.

54 *See* 42 U.S.C. § 2000e-2(a).

55 Disparate treatment based on the race or national origin of job applicants with the same qualifications and criminal records has been documented. For example, a 2003 study demonstrated that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as "testers" for her study. The "testers" in Pager's study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who *did not have* a criminal record. *Id.* at 958. *See also* Devah Pager et al., *Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers*, 623 Annals Am. Acad. Pol. & Soc. Sci., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and White testers with similar backgrounds and criminal records, "the negative effect of a criminal conviction is substantially larger for blacks than whites. . . . the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)"); *see id.* at 200""201 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official); Devah Pager, *Statement of Devah Pager, Professor of Sociology at Princeton University*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm (last visited April 23, 2012) (discussing the

results of the *Sequencing Disadvantage* study); Devah Pager & Bruce Western, NYC Commission on Human Rights, Race at Work, Realities of Race and Criminal Record in the NYC Job Market 6, Figure 2 (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (finding that White testers *with* a felony conviction were called back 13% of the time, Hispanic testers *without* a criminal record were called back 14% of the time, and Black testers *without* a criminal record were called back 10% of the time).

56 *Race & Color Discrimination*, *supra* note 15, § V.A.1.

57 A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of evidence to the contrary, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006), http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf; *see also* Harry Holzer et al., Urban Inst., Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles 6""7 (2003), http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf (describing the results of an employer survey where over 40% of the employers indicated that they would "probably not" or "definitely not" be willing to hire an applicant with a criminal record).

58 The Commission has not done matched-pair testing to investigate alleged discriminatory employment practices. However, it has issued an Enforcement Guidance that discusses situations where individuals or organizations file charges on the basis of matched-pair testing, among other practices. *See generally Enforcement Guidance: Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination*, U.S. Equal Emp't Opportunity Comm'n (May 22, 1996), http://www.eeoc.gov/policy/docs/testers.html.

59 42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. *Id.* § 2000e-2(k)(1)(A)(ii).

60 401 U.S. 424, 431""32 (1971).

61 *Id.* at 431.

62 The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also* Lewis v. City of Chicago, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); Ricci v. DeStefano, 557 U.S. 557 (2009) (same).

63 42 U.S.C. § 2000e-2(k)(1)(A)(i).

64 The Commission presumes that employers use the information sought and obtained from its applicants and others in making an employment decision. *See* Gregory v. Litton Sys. Inc.,316 F. Supp. 401, 403 (C.D. Cal.1970). If an employer asserts that it did not factor the applicant's or employee's known criminal record into an employment decision, the EEOC will seek evidence supporting this assertion. For example, evidence that the employer has other employees from the same protected group with roughly comparable criminal records may support the conclusion that the employer did not use the applicant's or employee's criminal record to exclude him from employment.

65 Unif. Crime Reporting Program, Fed. Bureau of Investigation, Crime in the U.S. 2010, at Table 43a (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls.

66 U.S. Census Bureau, The Black Population: 2010, at 3 (2011) , http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races").

67 Accurate data on the number of Hispanics arrested and convicted in the United States is limited. *See* Nancy E. Walker et al., Nat'l Council of La Raza, Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System 17""18 (2004), http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf (explaining why "[i]t is very difficult to find any information "" let alone accurate information "" on the number of Latinos arrested in the United States"). The Department of Justice's Bureau of Justice Statistics' (BJS) *Sourcebook of Criminal Justice Statistics* and the FBI's Crime Information Services Division do not provide data for arrests by ethnicity. *Id.* at 17. However, the U.S. Drug Enforcement Administration (DEA) disaggregates data by Hispanic and non-Hispanic ethnicity. *Id.* at 18. According to DOJ/BJS, from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos. Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Justice Statistics, 2009 "" Statistical Tables, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Accordingly, Hispanics were arrested for drug offenses by the DEA at a rate of three times their numbers in the general population. *See* U.S. Census Bureau, Overview of Race and Hispanic Origin: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (reporting that in 2010, "there were 50.5 million Hispanics in the United States, composing 16 percent of the total population"). However, national statistics indicate that Hispanics have similar or lower drug usage rates compared to Whites. *See, e.g.,* Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings 21, Figure 2.10 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting, for example, that the usage rate for Hispanics in 2009 was 7.9% compared to 8.8% for Whites).

68 *See, e.g.*, Human Rights Watch, Decades of Disparity: Drug Arrests and Race in the United States 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (noting that the "[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending . . . . blacks and whites engage in drug offenses - possession and sales - at roughly comparable rates"); Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings 21 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting that in 2010, the rates of illicit drug use in the United States among persons aged 12 or older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); Harry Levine & Deborah Small, N.Y. Civil Liberties Union, Marijuana Arrest Crusade: Racial Bias and Police Policy In New York City, 1997""2007, at 13""16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (citing U.S. Government surveys showing that Whites use marijuana at higher rates than African Americans and Hispanics; however, the marijuana arrest rate of Hispanics is nearly three times the arrest rate of Whites, and the marijuana arrest rate of African Americans is five times the arrest rate of Whites).

69 Prevalence of Imprisonment, *supra* note 4, at 1, 8. Due to the nature of available data, the Commission is using incarceration data as a proxy for conviction data.

70 *Id.*

71 *Id.*

72 Marc Mauer & Ryan S. King, The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity 10 (2007), www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofincbyraceandethnicity.pdf.

73 *Id*.

74 Paul Guerino et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Prisoners in 2010, at 27, Table 14 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (reporting that as of December 31, 2010, Black men were imprisoned at a rate of 3,074 per 100,000 Black male residents, Hispanic men were imprisoned at a rate of 1,258 per 100,000 Hispanic male residents, and White men were imprisoned at a rate of 459 per 100,000 White male residents); *cf.* One in 31, *supra* note 4, at 5 ("Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional

control. One in 11 black adults -- 9.2 percent -- was under correctional control [probation, parole, prison, or jail] at year end 2007.").

75 The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607, provide that "[employers] should maintain and have available . . . information on [the] adverse impact of [their employment selection procedures]." 29 C.F.R. § 1607.15A. "Where [an employer] has not maintained [such records, the EEOC] may draw an inference of adverse impact of the selection process from the failure of [the employer] to maintain such data . . . ." *Id.* § 1607.4D.

76 *See, e.g.*, El v. SEPTA, 418 F. Supp. 2d 659, 668""69 (E.D. Pa. 2005) (finding that the plaintiff established a prima facie case of disparate impact with evidence from the defendant's personnel records and national data sources from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S.), *aff'd on other grounds,* 479 F.3d 232 (3d Cir. 2007); Green v. Mo. Pac. R.R., 523 F.2d 1290, 1294""95 (8th Cir. 1975) (concluding that the defendant's criminal record exclusion policy had a disparate impact based on race by evaluating local population statistics and applicant data), *appeal after remand*, 549 F.2d 1158, 1160 (8th Cir. 1977).

77 457 U.S. 440, 442 (1982).

78 *Id.* at 453""54

79 433 U.S. 321, 330 (1977).

80*See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) (stating that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection").

81 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* 42 U.S.C. § 2000e(m) (defining the term "demonstrates" to mean "meets the burdens of production and persuasion").

82 422 U.S. 405 (1975).

83433 U.S. 321 (1977).

84 137 Cong. Rec. 15273 (1991) (statement of Sen. Danforth) ("[T]he terms "˜business necessity' and "˜job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." (citations omitted)). Section 105(b) of the Civil Rights Act of 1991 provides that only the interpretive memorandum read by Senator Danforth in the Congressional Record may be considered legislative history or relied upon in construing or applying the business necessity standard.

85 401 U.S. at 431, 436.

86 422 U.S. at 430""31 (endorsing the EEOC's position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with ""˜important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'" (quoting 29 C.F.R. § 1607.4(c))).

87 433 U.S. at 331""32 (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

88 *Id.* at 331 n.14.

89 523 F.2d 1290, 1293 (8th Cir. 1975). "In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he

had served 21 months in prison until paroled on July 24, 1970." *Id.* at 1292""93.

90 Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court's injunction prohibiting the employer from using an applicant's conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions, as long as the defendant took these three factors into account).

91 *Id.* (referring to completion of the sentence rather than completion of parole).

92 *Id.*

93 479 F.3d 232 (3d Cir. 2007).

94 *Id.* at 235.

95 *Id.* at 235, 236.

96 *Id.* at 235.

97 *Id.* at 244.

98 *Id.* at 244""45.

99 *Id.* at 247. *Cf.* Shawn Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 Criminology 27, 52 (2011) [hereinafter *The Predictive Value of Criminal Background Checks*] ("Given the results of the current as well as previous [recidivism] studies, the 40-year period put forward in *El v. SEPTA* (2007) . . . seems too old of a score to be still in need of settlement.").

100 *El*, 479 F.3d at 248.

101 Some states have enacted laws to limit employer inquiries concerning all or some arrest records. *See* Background Checks, *supra* note 25, at 48""49. At least 13 states have statutes explicitly prohibiting arrest record inquiries and/or dissemination subject to certain exceptions. *See, e.g.*, Alaska (Alaska Stat.§ 12.62.160(b)(8)); Arkansas (Ark. Code Ann. § 12-12-1009(c)); California (Cal. Lab. Code § 432.7(a)); Connecticut (Conn. Gen. Stat. § 46a-80(e)); Illinois (775 Ill. Comp. Stat. § 5/2-103(A)) (dealing with arrest records that have been ordered expunged, sealed, or impounded); Massachusetts (Mass. Gen. Laws ch. 151B § 4(9)); Michigan (Mich Comp. Laws § 37.2205a(1) (applying to misdemeanor arrests only)); Nebraska (Neb. Rev. Stat. § 29-3523(2)) (ordering no dissemination of arrest records under certain conditions and specified time periods)); New York (N.Y. Exec. Law § 296(16)); North Dakota (N.D. Cent. Code § 12-60-16.6(2)); Pennsylvania (18 Pa. Cons. Stat. § 9121(b)(2)); Rhode Island (R.I. Gen. Laws § 28-5-7(7)), and Wisconsin (Wis. Stat. §§ 111.321, 111.335a).

102 *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing federal prosecutors' broad discretionary authority to determine whether to prosecute cases and whether to bring charges before a grand jury); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining same for state prosecutors); *see also* Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2006, at 10, Table 11 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting that in the 75 largest counties in the country, nearly one-third of the felony arrests did not result in a conviction because the charges against the defendants were dismissed).

103 Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957) ("The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."); United States. v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006) (upholding a preliminary jury instruction that stated that a "defendant is presumed to be innocent unless proven guilty. The indictment against the Defendant is only an accusation, nothing more. It's not proof of guilt or anything else."); *see* Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) ("[I]nformation concerning a prospective employee's

record of arrests without convictions, is irrelevant to [an applicant's] suitability or qualification for employment."), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); Dozier v. Chupka, 395 F. Supp. 836, 850 n.10 (S.D. Ohio 1975) (stating that the use of arrest records was too crude a predictor of an employee's predilection for theft where there were no procedural safeguards to prevent reliance on unwarranted arrests); City of Cairo v. Ill. Fair Empl. Prac. Comm., 8 Empl. Prac. Dec. (CCH) & 9682 (Ill. App. Ct. 1974) (concluding that, where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted); *see also* EEOC Dec. 74 83, Â¶ 6424 (CCH) (1983) (finding no business justification for an employer's unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to reduce thefts in the workplace; the employer produced no evidence that these particular employees had been involved in any of the thefts, or that all people who are arrested but not convicted are prone towards crime in the future); EEOC Dec. 76 87, Â¶ 6665 (CCH) (1983) (holding that an applicant who sought to become a police officer could not be rejected based on one arrest five years earlier for riding in a stolen car when he asserted that he did not know that the car was stolen and the charge was dismissed).

104 *See* State Criminal History, *supra* note 37, at 2; *see also* Background Checks, *supra* note 25, at 17.

105 *See supra* notes 39-40.

106 S*ee* Clark v. Arizona, 548 U.S. 735, 766 (2006) ("The first presumption [in a criminal case] is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged. . . ."). *See also* Fed. R. Crim P 11 (criminal procedure rule governing pleas). The Supreme Court has concluded that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

107 *See supra* text accompanying note 39.

108 *See e.g.*, Haw. Rev. Stat. § 378-2.5(b). Under this provision, the employer may withdraw the offer of employment if the prospective employee has a conviction record "that bears a rational relationship to the duties and responsibilities of the position." *Id. See also* Conn. Gen. Stat. § 46a-80(b) ("[N]o employer . . . shall inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position."); Minn. Stat. § 364.021(a) ("[A] public employer may not inquire or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer."). State fair employment practices agencies have information about applicable state law.

109 *See generally* Nat'l League of Cities & Nat'l Emp't Law Project, Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records (2010), www.nelp.org/page/-/SCLP/2010/CitiesPavetheWay.pdf?nocdn=1 (identifying local initiatives that address ways to increase employment opportunities for individuals with criminal records, including delaying a background check until the final stages of the hiring process, leveraging development funds, and expanding bid incentive programs to promote local hiring priorities); Nat'l Emp't Law Project, City and County Hiring Initiatives (2010), www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf (discussing the various city and county initiatives that have removed questions regarding criminal history from the job application and have waited until after a conditional offer of employment has been made to conduct a background check and inquire about the applicant's criminal background).

110 Several federal laws automatically prohibit employing individuals with certain felony convictions or, in some cases, misdemeanor convictions. *See, e.g.*, 5 U.S.C. § 7371(b) (requiring the mandatory removal of any federal law enforcement officer who is convicted of a felony); 46 U.S.C. § 70105(c)(1)(A) (mandating that individuals who have been convicted of espionage, sedition, treason or terrorism be permanently disqualified from receiving a biometric transportation security card and thereby excluded from port work employment); 42 U.S.C. § 13726(b)(1) (disqualifying persons with felony convictions or domestic violence convictions from working for a private prisoner transport company); 25 U.S.C. § 3207(b)

(prohibiting individuals with a felony conviction, or any of two or more misdemeanor convictions, from working with Indian children if their convictions involved crimes of violence, sexual assault, molestation, exploitation, contact or prostitution, crimes against persons, or offenses committed against children); 18 U.S.C. § 922(g)(1), (9) (prohibiting an individual convicted of a felony or a misdemeanor for domestic violence from possessing a firearm, thereby excluding such individual from a wide range of jobs that require such possession); 18 U.S.C. § 2381 (prohibiting individuals convicted of treason from "holding any office under the United States"). Other federal laws prohibit employing individuals with certain convictions for a defined time period. *See, e.g.*, 5 U.S.C. § 7313(a) (prohibiting individuals convicted of a felony for inciting a riot or civil disorder from holding any position in the federal government for five years after the date of the conviction); 12 U.S.C. § 1829 (requiring a ten-year ban on employing individuals in banks if they have certain financial-related convictions); 49 U.S.C. § 44936(b)(1)(B) (imposing a ten-year ban on employing an individual as a security screener for an air carrier if that individuals has been convicted of specified crimes).

111 *See* 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

112 *Id.*

113 *Id.* § 1607.6B. The following subsections state:

> (1) *Where informal or unscored procedures are used*. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.
>
> (2) *Where formal and scored procedures are used*. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

Id. § 1607.6A, B(1)""(2).

114 *See, e.g.,* Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. Applied Psychol. 1427, 1430 (2007), http://internal.psychology.illinois.edu/~broberts/Roberts,%20Harms,%20Caspi,%20&%20Moffitt,%202007.pdf (finding that in a study of New Zealand residents from birth to age 26, "[a]dolescent criminal convictions were unrelated to committing counterproductive activities at work [such as tardiness, absenteeism, disciplinary problems, etc.]. In fact, according to the [results of the study], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or steal things from work.").

115 *See* Ohio Rev. Code Ann. § 2913.02.

116 523 F.2d at 1298 (stating that "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed").

117 479 F.3d at 247.

118 *See, e.g.*, Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 Howard J. of Crim. Just., 373, 380""81 (2009) (examining conviction data from Britain and Wales, a 2009 study found that the risk of recidivism declined for the groups with prior records and eventually converged within 10 to 15 years with the risk of those of the nonoffending comparison groups); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread*

Criminal Background Checks, 47 Criminology 327 (2009) (concluding that there may be a "point of redemption" (i.e., a point in time where an individual's risk of re-offending or re-arrest is reasonably comparable to individuals with no prior criminal record) for individuals arrested for certain offenses if they remain crime free for a certain number of years); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime & Delinquency 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942 and concluding that, after seven years, the risk of a new offense approximates that of a person without a criminal record); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958, a 2006 study concluded that the risk of recidivism decreases over time and that, six or seven years after an arrest, an individual's risk of re-arrest approximates that of an individual who has never been arrested).

119 *Griggs*, 401 U.S. at 431.

120 523 F.2d at 1298; *see also* Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) ("[A] blanket policy of denying employment to any person having a criminal conviction is a [*per se*] violation of Title VII."). The only exception would be if such an exclusion were required by federal law or regulation. *See, e.g., supra* note 110.

121 *Cf. Field*, 2002 WL 32345739, at *1. In *Field*, an employee of ten years was fired after a new company that acquired her former employer discovered her 6-year-old felony conviction. The new company had a blanket policy of firing anyone with a felony conviction less than 10 years old. The court granted summary judgment for the employee because the employer's argument that her conviction was related to her job qualifications was "weak at best," especially given her positive employment history with her former employer. *Id.*

122 Recidivism rates tend to decline as ex-offenders' ages increase. A 2011 study found that an individual's age at conviction is a variable that has a "substantial and significant impact on recidivism." *The Predictive Value of Criminal Background Checks*, *supra* note 99, at 43. For example, the 26-year-olds in the study, with no prior criminal convictions, had a 19.6% chance of reoffending in their first year after their first conviction, compared to the 36-year-olds who had an 8.8% chance of reoffending during the same time period, and the 46-year-olds who had a 5.3% of reoffending. *Id.* at 46. *See also* Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Recidivism of Prisoners Released in 1994, at 7 (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that, although 55.7% of ex-offenders aged 14""17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year).

Consideration of an applicant's age at the time the offense occurred or at his release from prison would benefit older individuals and, therefore, would not violate the Age Discrimination in Employment Act of 1967, *as amended,* 29 U.S.C. § 621 *et seq*. *See* Age Discrimination in Employment Act, 29 C.F.R. § 1625.2 ("Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old."); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (concluding that the ADEA does not preclude an employer from favoring an older employee over a younger one within the protected age group).

123 *See* Laura Moskowitz, *Statement of Laura Moskowitz, Staff Attorney, National Employment Law Project's Second Chance Labor Project*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm (last visited April 23, 2012) (stating that one of the factors that is relevant to the assessment of an ex-offender's risk to a workplace and to the business necessity analysis, is the "length and consistency of the person's work history, including whether the person has been recently employed"; also noting that various studies have "shown a strong relationship between employment and decreases in crime and recidivism"). *But see* Stephen J. Tripodi et al., *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 Int'l J. of Offender Therapy and

Comp. Criminology 716, 716 (2010) (finding that "[b]ecoming employed after incarceration, although apparently providing initial motivation to desist from crime, does not seem to be on its own sufficient to prevent recidivism for many parolees").

124 *See* Wendy Erisman & Jeanne Bayer Contardo, Inst. for Higher Educ. Policy, Learning to Reduce Recidivism: A 50 State Analysis of Postsecondary Correctional Education 5 (2005), http://www.ihep.org/assets/files/publications/g-l/LearningReduceRecidivism.pdf (finding that increasing higher education for prisoners enhances their prospects for employment and serves as a cost-effective approach to reducing recidivism); *see also* John H. Laud & Robert J. Sampson, *Understanding Desistance from Crime*, 28 Crime & Just. 1, 17""24 (2001), http://www.ncjrs.gov/pdffiles1/Digitization/192542-192549NCJRS.pdf (stating that factors associated with personal rehabilitation and social stability, such as stable employment, family and community involvement, and recovery from substance abuse, are correlated with a decreased risk of recidivism).

125 Some employers have expressed a greater willingness to hire ex-offenders who have had an ongoing relationship with third party intermediary agencies that provide supportive services such as drug testing, referrals for social services, transportation, child care, clothing, and food. *See* Amy L. Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry*, 2004 Urban Inst. 20, http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf. These types of services can help ex-offenders avoid problems that may interfere with their ability to obtain and maintain employment. *Id.*; *see generally* Victoria Kane, *Transcript of 7-26-11 Meeting,* U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#kane (last visited April 23, 2012) (describing why employers should partner with organizations that provide supportive services to ex-offenders).

126 *See generally* Reentry Mythbuster! on Federal Bonding Program, *supra* note 16; *Work Opportunity Tax Credit (WOTC),* Emp't & Training Admin., U.S. Dep't of Labor, http://www.doleta.gov/business/incentives/opptax/ (last visited April 3, 2012); *Directory of State Bonding Coordinators*, Emp't & Training Admin., U.S. Dep't of Labor, http://www.doleta.gov/usworkforce/onestop/FBPContact.cfm (last visited April 3, 2012); *Federal Bonding Program - Background*, U.S. Dep't of Labor, http://www.bonds4jobs.com/program-background.html (last visited April 3, 2012); *Bureau of Prisons: UNICOR's Federal Bonding Program,* http://www.bop.gov/inmate_programs/itb_bonding.jsp (last visited April 3, 2012).

127 This example is loosely based on a study conducted by Alfred Blumstein and Kiminori Nakamura measuring the risk of recidivism for individuals who have committed burglary, robbery, or aggravated assault. *See* Blumstein & Nakamura, *supra* note 118.

128 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C). *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988).

129 *See* Exec. Order No. 12,067, 3 C.F.R. 206 (1978 Comp.).

130 *See* 49 U.S.C. §§ 44935(e)(2)(B), 44936(a)(1), (b)(1). The statute mandates a criminal background check.

131 *See* 5 U.S.C. § 7371(b) (requiring mandatory removal from employment of law enforcement officers convicted of felonies).

132 *See* 42 U.S.C. § 13041(c) ("Any conviction for a sex crime, an offense involving a child victim, or a drug felony may be grounds for denying employment or for dismissal of an employee. . . .").

133 12 U.S.C. § 1829.

134 46 U.S.C. § 70105(c).

135 Other jobs and programs subject to federally-imposed restrictions based on criminal convictions include the business of insurance (18 U.S.C. § 1033(e)), employee benefits employee (29 U.S.C. § 1111(a)), participation in Medicare and state

health care programs (42 U.S.C. § 1320a-7(a)""(b)), defense contractor (10 U.S.C. § 2408(a)), prisoner transportation (42 U.S.C. § 13726b(b)(1)), and court-imposed occupational restrictions (18 U.S.C. §§ 3563(b)(5), 3583(d)). This list is not meant to be exhaustive.

136 *See, e.g.*, federal statutes governing commercial motor vehicle operator's licenses (49 U.S.C. § 31310(b)-(h)), locomotive operator licenses (49 U.S.C. § 20135(b)(4)(B)), and certificates, ratings, and authorizations for pilots, flight instructors, and ground instructors (49 U.S.C. §§ 44709(b)(2), 44710(b), 4711(c); 14 C.F.R. § 61.15).

137 *See, e.g.*, federal statutes governing loan originator licensing/registration (12 U.S.C. § 5104(b)(2)), registration of brokers and dealers (15 U.S.C. § 78o(b)(4)(B)), registration of commodity dealers (7 U.S.C. § 12a(2)(D), (3)(D), (E), (H)), and registration of investment advisers (15 U.S.C. § 80b-3(e)(2)-(3), (f)).

138 *See, e.g.*, custom broker's licenses (19 U.S.C. § 1641(d)(1)(B)), export licenses (50 U.S.C. App. § 2410(h)), and arms export (22 U.S.C. § 2778(g)).

139 *See, e.g.*, grain inspector's licenses (7 U.S.C. § 85), merchant mariner's documents, licenses, or certificates of registry (46 U.S.C. § 7503(b)), licenses to import, manufacture, or deal in explosives or permits to use explosives (18 U.S.C. § 843(d)), and farm labor contractor's certificates of registration (29 U.S.C. § 1813(a)(5)). This list of federally-imposed restrictions on occupational licenses and registrations for individuals with certain criminal convictions is not meant to be exhaustive. For additional information, please consult the relevant federal agency or department.

140 *See* 12 U.S.C. § 1829(a)(1). The statute imposes a ten-year ban for individuals who have been convicted of certain financial crimes such as corruption involving the receipt of commissions or gifts for procuring loans (18 U.S.C. § 215), embezzlement or theft by an officer/employee of a lending, credit, or insurance institution (18 U.S.C § 657), false or fraudulent statements by an officer/employee of the federal reserve or a depository institution (18 U.S.C. § 1005), or fraud by wire, radio, or television that affects a financial institution (18 U.S.C. § 1343), among other crimes. *See* 12 U.S.C. § 1829(a)(2)(A)(i)(I), (II). Individuals who have either been convicted of the crimes listed in § 1829(a)(2)(A), or conspiracy to commit those crimes, will not receive an exception to the application of the 10-year ban from the FDIC. 12 U.S.C. § 1829(a)(2)(A).

141 *See* Fed. Deposit Ins. Corp., FDIC Statement of Policy For Section 19 of the FDI Act, § C, "Procedures" (amended May 13, 2011), http://www.fdic.gov/regulations/laws/rules/5000-1300.html [hereinafter FDIC Policy]; *see also* Statement of Policy, 63 Fed. Reg. 66,177, 66,184 (Dec. 1, 1998); Clarification of Statement of Policy, 76 Fed. Reg. 28,031 (May 13, 2011) (clarifying the FDIC's Statement of Policy for Section 19 of the FDI Act).

"Approval is automatically granted and an application [for a waiver] will not be required where [an individual who has been convicted of] the covered offense [criminal offenses involving dishonesty, breach of trust, or money laundering] . . . meets all of the ["*de minimis*"] criteria" set forth in the FDIC's Statement of Policy. FDIC Policy, *supra*, § B (5). These criteria include the following: (1) there is only one conviction or program of record for a covered offense; (2) the offense was punishable by imprisonment for a term of one year or less and/or a fine of $1,000 or less, and the individual did not serve time in jail; (3) the conviction or program was entered at least five years prior to the date an application would otherwise be required; and (4) the offense did not involve an insured depository institution or insured credit union. *Id.* Additionally, an individual's conviction for writing a "bad" check will be considered a *de minimis* offense, even if it involved an insured depository institution or insured credit union, if: (1) all other requirements of the *de minimis* offense provisions are met; (2) the aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was $1000 or less; and (3) no insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction. *Id.*

142 *See* FDIC Policy, *supra* note 141, § C, "Procedures."

143 *Id. But cf.* Nat'l H.I.R.E. Network, People with Criminal Records Working in Financial Institutions: The Rules on FDIC Waivers, http://www.hirenetwork.org/FDIC.html ("Institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual requirement. Most individuals probably are unaware that they have this right."); Fed. Deposit Insur. Corp. 2010 Annual Report, § VI.A: Key Statistics, FDIC Actions on Financial Institution Applications 2008""2010 (2011), http://www.fdic.gov/about/strategic/report/2010annualreport/chpt6-01.html (reporting that between 2008 and 2010, the FDIC approved a total of 38 requests for consent to employ individuals with covered offenses in their background; the agency did not deny any requests during this time period).

144 FDIC Policy, *supra* note 141, § D, "Evaluation of Section 19 Applications" (listing the factors that are considered in this waiver review process, which include: (1) the nature and circumstances underlying the offense; (2) "[e]vidence of rehabilitation including the person's reputation since the conviction . . . the person's age at the time of conviction . . . and the time which has elapsed since the conviction"; (3) the position to be held in the insured institution; (4) the amount of influence/control the individual will be able to exercise over management affairs; (5) management's ability to control and supervise the individual's activities; (6) the degree of ownership the individual will have in the insured institution; (7) whether the institution's fidelity bond coverage applies to the individual; (8) the opinion of the applicable federal and/or state regulators; and (9) any other relevant factors).

145 *See* 49 C.F.R. §§ 1515.7 (describing the procedures for waiver of criminal offenses, among other standards), 1515.5 (explaining how to appeal the Initial Determination of Threat Assessment based on a criminal conviction). In practice, some worker advocacy groups have criticized the TWIC appeal process due to prolonged delays, which leaves many workers jobless; especially workers of color. *See generally* Maurice Emsellem et al., Nat'l Emp't Law Project, A Scorecard on the Post-911 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession (2009), http://nelp.3cdn.net/2d5508b4cec6e13da6_upm6b20e5.pdf.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6201, 124 Stat. 721 (2010) (the Act) includes a process to appeal or dispute the accuracy of information obtained from criminal records. The Act requires participating states to perform background checks on applicants and current employees who have direct access to patients in long-term care facilities, such as nursing homes, to determine if they have been convicted of an offense or have other disqualifying information in their background, such as a finding of patient or resident abuse, that would disqualify them from employment under the Social Security Act or as specified by state law. *See* 42 U.S.C. § 1320a-7l(a)(3)(A), (a)(4)(B), (6)(A)""(E). The background check involves an individualized assessment of the relevance of a conviction or other disqualifying information. The Act protects applicants and employees in several ways, for example, by: (1) providing a 60-day provisional period of employment for the prospective employee, pending the completion of the criminal records check; (2) providing an independent process to appeal or dispute the accuracy of the information obtained in the criminal records check; and (3) allowing the employee to remain employed (subject to direct on-site supervision) during the appeals process. 42 U.S.C. § 1320a-7l(a)(4)(B)(iii), (iv).

146*See* 46 U.S.C. § 70105(d); *see generally* TWIC Program, 49 C.F.R. § 1572.103 (listing the disqualifying offenses for maritime and land transportation security credentials, such as convictions and findings of not guilty by reason of insanity for espionage, murder, or unlawful possession of an explosive; also listing temporarily disqualifying offenses, within seven years of conviction or five years of release from incarceration, including dishonesty, fraud, or misrepresentation (expressly excluding welfare fraud and passing bad checks), firearms violations, and distribution, intent to distribute, or importation of controlled substances).

147 46 U.S.C. § 70105(c)(1)(A)""(B).

148 46 U.S.C. § 70105(c)(1)(B)(iii).

149 *See* 46 U.S.C. § 70105(c)(1)(A)(iv) (listing "Federal crime of terrorism" as a permanent disqualifying offense); *see also* 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal crime of terrorism" to include the use of weapons of mass destruction under § 2332a).

150 *See* 49 C.F.R. § 1515.7(a)(i) (explaining that only certain applicants with disqualifying crimes in their backgrounds may apply for a waiver; these applicants do not include individuals who have been convicted of a Federal crime of terrorism as defined by 18 U.S.C. § 2332b(g)).

151 These positions are defined as "national security positions" and include positions that "involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States" or "require regular use of, or access to, classified information." 5 C.F.R. § 732.102(a)(1)""(2). The requirements for "national security positions" apply to competitive service positions, Senior Executive Service positions filled by career appointment within the Executive Branch, and excepted service positions within the Executive Branch. *Id.* § 732.102(b). The head of each Federal agency can designate any position within that department or agency as a "sensitive position" if the position "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." *Id.* § 732.201(a). Designation of a position as a "sensitive position" will fall under one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive. *Id.*

152 *See* Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 391 (1995 Comp.):

> [E]ligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honestly, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

153 42 U.S.C. § 2000e-2(g); *see, e.g.*, Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[E]mployment actions based on denial of a security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

154 *See Policy Guidance on the use of the national security exception contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended*, U.S. Equal Emp't Opportunity Comm'n, § II, *Legislative History* (May 1, 1989), http://www.eeoc.gov/policy/docs/national_security_exemption.html ("[N]ational security requirements must be applied equally without regard to race, sex, color, religion or national origin."); *see also* Jones v. Ashcroft, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (indicating that the national security exception did not apply because there was no evidence that the government considered national security as a basis for its decision not to hire the plaintiff at any time before the commencement of the plaintiff's lawsuit, where the plaintiff had not been forthright about an arrest).

155 Federal contractor employees may challenge the denial of a security clearance with the EEOC or the Office of Contract Compliance Programs when the denial is based on race, color, religion, sex, or national origin. *See generally* Exec. Order No. 11,246, 3 C.F.R. 339 (1964""1965 Comp.).

156 42 U.S.C. § 2000e-16(a).

157 Robert H. Shriver, III, *Written Testimony of Robert H. Shriver, III, Senior Policy Counsel for the U.S. Office of Personnel Management*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm (last visited April 23, 2012) (stating that "with just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service"); *see also* Reentry Mythbuster! on Federal Hiring Policies, *supra* note 16 ("The Federal Government employs people with criminal records with the requisite knowledge, skills and abilities."). *But see supra* note 110, listing several federal statutes that prohibit individuals with certain convictions from working as federal law enforcement officers or port workers, or with private prisoner transport companies.

158 OPM has jurisdiction to establish the federal government's suitability policy for competitive service positions, certain excepted service positions, and career appointments in the Senior Executive Service. *See* 5 C.F.R. §§ 731.101(a) (stating that OPM has been directed "to examine "˜suitability' for competitive Federal employment"), 731.101(b) (defining the covered positions within OPM's jurisdiction); *see also* Shriver, *supra* note 157.

OPM is also responsible for establishing standards that help agencies decide whether to grant their employees and contractor personnel long-term access to federal facilities and information systems. *See* Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors, 2 Pub. Papers 1765 (Aug. 27, 2004) ("establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors [including contractor employees]"); *see also* Exec. Order No. 13,467, § 2.3(b), 3 C.F.R. 196 (2009 Comp.) ("[T]he Director of [OPM] . . . [is] responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access."); *see generally* Shriver, *supra* note 157.

159 5 C.F.R. § 731.101(a).

160 *See* 5 C.F.R. §§ 731.205(a) (stating that if an agency finds applicants unsuitable based on the factors listed in 5 C.F.R. § 731.202, it may, in its discretion, bar those applicants from federal employment for three years), § 731.202(b) (disqualifying factors from federal civilian employment may include: misconduct or negligence in employment; material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by 5 C.F.R. § 5.4; alcohol abuse without evidence of substantial rehabilitation; illegal use of narcotics, drugs, or other controlled substances; and knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force).

161 *See id.* § 731.202(c).

162 *Id.*

163 *See generally* Shriver, *supra* note 157. *See also* Reentry Mythbuster! on Federal Hiring Policies, *supra* note 16 ("Consistent with Merit System Principles, [federal] agencies [and departments] are required to consider people with criminal records when filling positions if they are the best candidates and can comply with requirements.").

164 *See generally EEOC Informal Discussion Letter* (March 19, 2007), http://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html#N1 (discussing the EEOC's concerns with changes to OPM's suitability regulations at 5 CFR part 731).

165 *See* Stephen Saltzburg, *Transcript of 7-26-11 Meeting*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#saltzburg (last visited April 23, 2012) (discussing the findings from the American Bar Association's (ABA) Collateral Consequences of Conviction Project, which found that in 17 states that it has examined to date, 84% of the collateral sanctions against ex-offenders relate to employment). For more information about the ABA's project, visit: Janet Levine, *ABA Criminal Justice Section Collateral Consequences Project*, Inst. for Survey Research, Temple Univ., http://isrweb.isr.temple.edu/projects/accproject/ (last visited April 20, 2012). In April 2011,

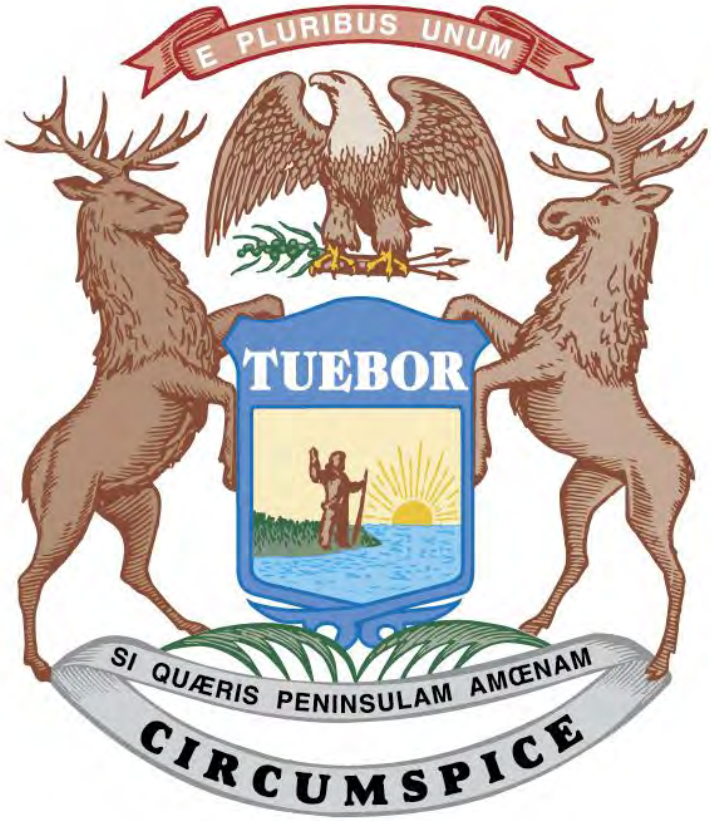
Attorney General Holder sent a letter to every state Attorney General, with a copy to every Governor, asking them to "evaluate the collateral consequences" of criminal convictions in their state, such as employment-related restrictions on ex-offenders, and "to determine whether those [consequences] that impose burdens on individuals . . . without increasing public safety should be eliminated." Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to state Attorney Generals and Governors (April 18, 2011), http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf.

Most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children. *See* State Criminal History, *supra* note 37, at 10 ("Fifty states and the District of Columbia reported that criminal history background checks are legally required" for several occupations such as nurses/elder caregivers, daycare providers, caregivers in residential facilities, school teachers, and nonteaching school employees). For example, Hawaii's Department of Human Services may deny applicants licensing privileges to operate a childcare facility if: (1) the applicant or any prospective employee has been convicted of a crime other than a minor traffic violation or has been confirmed to have abused or neglected a child or threatened harm; and (2) the department finds that the criminal history or child abuse record of the applicant or prospective employee may pose a risk to the health, safety, or well-being of children. *See* Haw. Rev. Stat. § 346-154(e)(1)""(2).

166 42 U.S.C. § 2000e-7.

167 *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court's conclusion that "the mandates of state law are no defense to Title VII liability").

ATTACHMENT 5



Michigan Joint Task Force on Jail and Pretrial Incarceration

Report and Recommendations

January 10, 2020

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Members of the Michigan Joint Task Force on Jail and Pretrial Incarceration

Lieutenant Governor Garlin Gilchrist II (Task Force Co-chair), Office of Governor Gretchen Whitmer

Chief Justice Bridget McCormack (Task Force Co-chair), Michigan Supreme Court

Lieutenant Jim Miller (Arrest and Arrest Alternatives Subgroup Chair), Allegan County Sheriff's Office

Honorable Thomas Boyd (Pretrial Release and Detention Subgroup Chair), 55th District Court

Senator Sylvia Santana (Sentencing, Probation, and Parole Subgroup Chair), Michigan Senate

Dr. Amanda Alexander, Detroit Justice Center

Sheriff Jerry Clayton, Washtenaw County Sheriff's Office

Craig DeRoche, Prison Fellowship

Honorable Prentis Edwards, 3rd Circuit Court

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Representative Mike Mueller, Michigan House of Representatives

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Commissioner Bill Peterson, Alpena County Commission

Senator Jim Runestad, Michigan Senate

Commissioner Jim Talen, Kent County Commission

Rob VerHeulen, former member of the Michigan House of Representatives

Representative Tenisha Yancey, Michigan House of Representatives

Executive Summary of Findings

In a relatively short period of time, county jail populations nearly tripled in Michigan. Elevating jails as a shared bipartisan priority, state and local leaders created the Michigan Joint Task Force on Jail and Pretrial Incarceration, directing the body to analyze jail populations across the state and develop legislative recommendations for consideration in 2020.

Jails as a tool for public safety. County jails are high traffic institutions, impacting hundreds of thousands more Michiganders each year than state prisons. Incarceration in a jail can prevent an immediately dangerous situation from escalating, enable a court to evaluate conditions of release or responses to probation violations, and allow a person who has been victimized to plan for their safety. At the same time, research shows that even short periods of jail incarceration can increase future criminal behavior, suggesting that, while jail may be appropriate for those who pose a significant threat to an individual or the public, policymakers should expand and incentivize jail alternatives for those who do not.

Constitutional protections. The use of jail as a tool is limited by the Constitution's guarantees of liberty, due process, and equal protection. As former Chief Justice Rehnquist wrote in *United States v. Salerno* (1987), "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." In just the last five years, courts across the country have upheld challenges to common pretrial practices, finding that those detained in jails were not getting meaningful due process hearings and that poor people were being denied equal protection of the laws when access to money was the deciding factor between those released and those detained. A similar lawsuit is currently pending in Michigan.

Increased jail use over time. Michigan's jail growth was driven equally by incarceration of pretrial defendants and those serving a sentence post-conviction. Local estimates suggest that roughly a quarter of people entering jails have serious mental illnesses. Both the jail population growth and the prevalence of mental illness in jails were more pronounced in rural Michigan counties where treatment and other resources are less available. While taxpayers spend nearly half a billion dollars annually on jails, alternatives to jail and services for crime victims are relatively underfunded and in high demand across the state.

Little guidance on the use of jail alternatives. Law enforcement, pretrial, and sentencing practices vary widely, and in many key policy areas, ranging from arrest and bail to sentencing and probation violations. Michigan law provides little to no guidance on when alternatives to jail should be the preferred or presumed intervention.

Who is coming to jail? Traffic offenses accounted for half of all criminal court cases in 2018 and driving without a valid license was the third most common reason people went to jail in Michigan. Other common reasons ranged from theft, drug possession, and probation violations to more serious charges like domestic violence, drunk driving, and drug sales.

How long are people staying in jail? Between 2016 and 2018, average jail stays were 45 days for felony offenses and 11 days for misdemeanor offenses. These averages comprised a wide range, however, with nearly half spending a day or less in jail, 65 percent staying less than a week, and 17 percent remaining for longer than a month (a relatively small group, but one that accounted for 82 percent of the jail space used). This broad range was also seen in pretrial detention lengths, with a large portion of people able to post bond and be released within a day, a substantial number being detained for one or two weeks and then sentenced to "time served," and some stays lasting months or years without going to trial.

Policymakers in Michigan aiming to address jail incarceration must therefore address both the large number of people whose lives are disrupted by short jail stays, who consume significant amounts of public safety resources, and the relatively small group of people whose long stays drive up county jail populations.

Overview of Task Force Recommendations

Traffic violations

Stop suspending and revoking licenses for actions unrelated to safe driving. Reclassify most traffic offenses and some other minor misdemeanors as civil rather than criminal infractions.

Arrest

Expand officer discretion to use appearance tickets as an alternative to arrest and jail. Reduce the use of arrest warrants to enforce court appearance and payments, and establish a statewide initiative to resolve new warrants and recall very old ones.

Behavioral health diversion

Provide crisis response training for law enforcement and incentivize programs and partnerships between law enforcement and treatment providers to divert people with behavioral health needs from the justice system pre- and post-arrest.

The first 24 hours after arrest

Release people jailed on certain charges pre-arraignment and guarantee appearance before a judicial officer within 24-48 hours for anyone still detained.

Pretrial release and detention

Strengthen the presumption of release on personal recognizance and set higher thresholds for imposing non-financial and financial conditions. Provide a detention hearing for all defendants still detained 48 hours after arraignment.

Speedy trial

Require defendants to be tried within 18 months of arrest and preserve speedy trial rights unless waived by the defendant.

Alternatives to jail sentences

Presumptively impose sentences other than jail for non-serious misdemeanors and for felonies marked for “intermediate sanctions” under the sentencing guidelines.

Probation and parole

Shorten maximum probation terms for most felonies, establish new caps on jail time for technical violations, and streamline the process for those in compliance to earn early discharge.

Financial barriers to compliance

Reduce fine amounts for civil infractions. Require criminal courts to determine ability to pay fines and fees at sentencing and to modify unaffordable obligations. Repeal the law authorizing sheriffs to bill people for their own incarceration.

Victim services

Invest significant resources in victim services and strengthen protection order practices.

Data collection

Standardize criminal justice data collection and reporting across the state.

Michigan Joint Task Force on Jail and Pretrial Incarceration

Anyone can identify a problem. But it takes real leaders to present solutions.

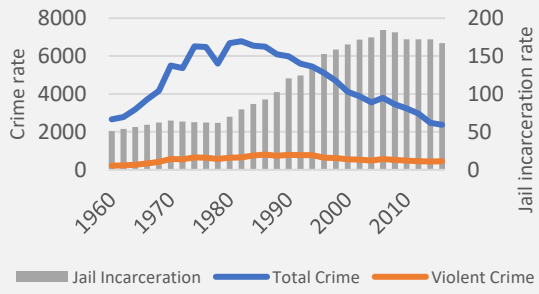
— Speaker of the House Lee Chatfield
First Meeting of the Michigan Joint Task Force on Jail and Pretrial Incarceration, July 24, 2019

State and county leaders in Michigan launched an inter-branch, bipartisan project aimed at increasing justice system efficiency and effectiveness. Created in the spring of 2019, the Michigan Joint Task Force on Jail and Pretrial Incarceration was charged with examining how state laws, policies, and budgetary decisions affect who goes to jail and how long they stay, and with crafting policy recommendations for the legislature's consideration in 2020.

In less than 40 years, the number of people held in Michigan's county jails nearly tripled.[1] This growth was not driven by increasing crime. Crime rates have dropped to 50-year lows, and the reasons for Michigan's surge in local incarceration have not been entirely clear.[2] In fact, the tripling of Michigan's jail population went largely unnoticed by state lawmakers because no dataset existed to answer the questions: Who is in Michigan's county jails? For how long? And why?

The last time crime was this low, far fewer Michiganders were in jail.

Michigan crime and jail incarceration rates, 1960-2016.



Source: U.S. Department of Justice, Bureau of Justice Statistics, Census of Jails and Annual Survey of Jails; U.S. Census Bureau, Population Division; Federal Bureau of Investigation, Uniform Crime Reporting Program.
Note: Total Crime is the sum of Property Crime and Violent Crime.

In February of 2019, state and county leaders elevated jail incarceration as a bipartisan priority. Governor Gretchen Whitmer, Senate Majority Leader Mike Shirkey, Speaker Lee Chatfield, Chief Justice Bridget McCormack, Executive Director of the Michigan Sheriffs' Association Blaine Koops, and Executive Director of the Michigan Association of Counties Stephan Currie signed a letter outlining the scope of work for what would become the Michigan Joint Task Force on Jail and Pretrial Incarceration (Task Force) and invited technical assistance from The Pew Charitable Trusts and State Court Administrative Office. The body was created by Executive Order 2019-10 and tasked with developing recommendations to:

- Expand jail alternatives for those who can be managed in the community,
- Safely reduce jail admissions, length of stay, and associated costs,
- Support consistent, objective, and evidence-based pretrial decision-making,
- Provide services and support to crime victims,
- Improve the efficiency and effectiveness of the state's and counties' justice and public safety systems, and
- Better align practices with research and constitutional mandates.[3]

[1] U.S. Department of Justice, Bureau of Justice Statistics, Census of Jails and Annual Survey of Jails. See 'Jail Data' in *Data Sources and Methods.*
[2] FBI, Uniform Crime Reporting Program. See 'Crime Data' in *Data Sources and Methods.*
[3] Michigan Executive Order 2019-10 (2019).

Chaired by Chief Justice Bridget McCormack and Lieutenant Governor Garlin Gilchrist, the Task Force held six public meetings, several rounds of subgroup meetings, and more than a dozen stakeholder roundtables, and received testimony from roughly 150 practitioners and members of the public. Video archives of the Task Force's public testimony can be found at the links below:

- August 23, 2019
- September 20, 2019
- October 18, 2019
- November 19, 2019

The Task Force examined 10 years of arrest data gathered from more than 600 law enforcement agencies across the state, 10 years of court data collected from nearly 200 district and circuit courts, and three years of individual-level admission data from a diverse sample of 20 county jails.[4] Drawing on this data, their collective expertise, relevant research and constitutional jurisprudence, statutory analysis, surveys, hundreds of interviews conducted by Task Force staff, guidance from roundtable participants, and public testimony, the Task Force now issues this report with key findings and 18 recommendations for state lawmakers.

EXPERT ROUNDTABLES

Between July and November 2019, the Task Force hosted roundtable discussions with:

- Judges,
- Prosecutors,
- Defense attorneys,
- Crime victims, survivors, and victim-services professionals,
- Law enforcement patrol officers,
- Jail administrators and corrections officers,
- District court probation officers,
- Felony probation and parole staff,
- Pretrial services and community corrections agencies,
- County commissioners,
- Bail agents and underwriters,
- Rural practitioners,
- Currently incarcerated individuals, and
- Faith leaders.

[4] Datasets utilized in this report are described in the *Data Sources and Methods* section.

Key Findings

To understand who is going to jail and how long they stay, the Task Force examined nationally collected data on Michigan's jails, 10 years of arrest data gathered from more than 600 law enforcement agencies across the state, 10 years of court data collected from nearly 200 district and circuit courts, and three years of individual-level admission data from a diverse sample of 20 county jails. The Task Force also reviewed the latest research on the impacts of jail incarceration and the growing body of legal jurisprudence about the constitutional limitations on detention prior to trial.

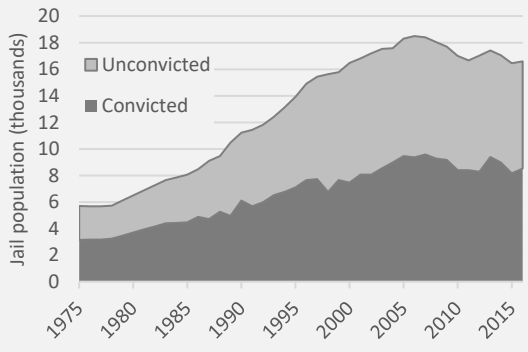
More information on the data utilized in this report is available in the *Data Sources and Methods* section.

Who is going to jail?

Jails hold a varied population, including a mix of people facing misdemeanor and felony charges, both pretrial and convicted, as well as those detained for authorities other than the county, such as the federal government. The number of people in Michigan's jails nearly tripled from an average daily population of 5,700 in 1975 to an average of 16,600 in 2016. The state's jail growth did not track with crime trends, increasing both when crime was going up and when it was going down. In the last decade, index crime rates have fallen to the lowest levels experienced in Michigan in more than 50 years, yet jail populations remain high. The state's jail growth was driven equally by incarceration of pretrial defendants and those serving a sentence post-conviction. Over the past few decades Michigan's jail population has maintained a roughly even split between pretrial and convicted detainees.[5]

Michigan's jail growth is equally driven by pretrial and convicted populations.

Convicted and unconvicted jail population, 1975- 2016.



Source: Bureau of Justice Statistics, Census of Jails and Annual Survey of Jails, See 'Jail Data' in *Data Sources and Methods.*

JAILS vs. PRISONS

Jails are often called the "front door" of the criminal justice system. They hold people who are awaiting trial or serving a short period of incarceration as a sentence for a minor crime. Prisons, on the other hand, hold people convicted and sentenced for more serious crimes, including those who serve very long periods behind bars.

In 2017, there were nearly 11 million admissions to county jails across the United States— a figure 17 times the number sent to state and federal prisons.

In Michigan, prison data is centralized with the Michigan Department of Corrections. Data on jail admissions and length of stay is kept locally in each county. Before the Task Force was created, there was no single reliable dataset in Michigan that could answer the questions: Who is in jail across the state? For how long? And why?

Source: Bureau of Justice Statistics, *Prisoners in 2017* (2019). Bureau of Justice Statistics, *Jail Inmates in 2017* (2019).

[5] U.S. Department of Justice, Bureau of Justice Statistics, Census of Jails and Annual Survey of Jails. FBI, Uniform Crime Reporting Program. See 'Jail Data' and 'Crime Data' in *Data Sources and Methods.*

The Task Force analyzed three years of data on admissions and releases from a diverse sample of 20 county jails representing nearly half of the state's jail population. The 10 most common offenses at admission, shown in the figure below, ranged from operating under the influence to delivery of controlled substances. Over 60 percent of jail admissions were for misdemeanor charges.

Jail admissions were comprised of a wide range of offenses.

Top 10 Offenses, Most Serious Charge at Jail Admission	
1.	Operating Under the Influence (OUI)
2.	Assault
3.	Driving Without Valid License
4.	Theft
5.	Probation/Parole Violation
6.	Possession or Use of Controlled Substance
7.	Obstruction of Justice
8.	Other Person Offense
9.	Domestic Violence
10.	Delivery or Manufacture of Controlled Substance

Source: Sample of jails, 2016-2018. See 'Jail Data' in *Data Sources and Methods.*

Most individuals who were booked into jail were admitted only once over the three-year period, but those who were admitted multiple times accounted for nearly two-thirds of the admissions in the sample.

Demographics

Black men made up six percent of the resident population of the counties included in the Task Force's sample of jails but accounted for 29 percent of all jail admissions. There were also significant differences in the most common reasons black people and white people went to jail. Driving without a valid license was a more common reason for jail admission among black people compared to white people, and the opposite was true for operating under the influence—it was a more common reason for jail admission among white people than black people. Differences were also seen by age. Jail admissions were highest for people in their 20s and dropped off significantly for those who were past their mid-30s.[6]

Recently, men outnumbered women nearly six to one in Michigan jails across the state, but over time the female jail population has grown at a much faster rate.[7]

Black men made up 29% of jail admissions and 6% of the resident population.

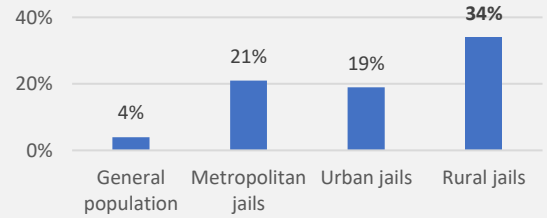
Source: Sample of jails, 2016-2018. See 'Jail Data' in *Data Sources and Methods.*

Mental health

Members of the Task Force and the public were particularly concerned with the number of people admitted to jail with mental health disorders. Figures on the prevalence of mental illness in jails are scarce. One national survey estimated that one in four men and one in three women in county jails met the threshold for serious psychological distress.[8] Screenings of jail admission samples in several Michigan counties estimated that 23 percent of those entering jails had a serious mental illness, with higher percentages in rural counties, where community-based services are scarce. This population also tended to stay in jail longer than people facing similar charges who did not have a serious mental illness.[9]

People admitted to jail had higher rates of serious mental illness, especially in rural jails.

Prevalence of serious mental illness in Michigan, 2017



Source: Wayne State University's Center for Behavioral Health and Justice; Substance Abuse and Mental Health Services Administration. See 'Mental Health' in *Data Sources and Methods.*

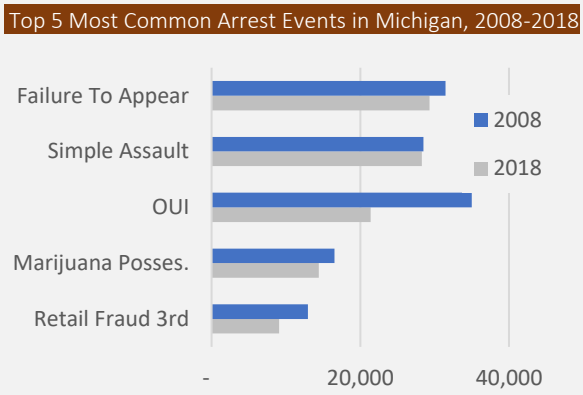
[6] Sample of jails 2016-2018. See 'Jail Data' in *Data Sources and Methods.*
[7] Bureau of Justice Statistics, Census of Jails and Annual Survey of Jails. Jail population in 2016.
[8] Bureau of Justice Statistics, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012* (2017).
[9] Wayne State University's Center for Behavioral Health and Justice. See 'Mental Health' in *Data Sources and Methods.*

Change in arrests

A critical factor in the number of people entering jail each year is how many people are arrested. The Michigan State Police track hundreds of thousands of arrests and criminal citations[10] each year from all law enforcement agencies statewide. This data includes some traffic-related offenses, like operating under the influence, but excludes most traffic offenses.

Although arrests have been dropping in Michigan, the jail population has not declined proportionally. Between 2008 and 2018, arrest events dropped 22 percent, driven largely by a reduction in arrests for people age 25 and younger. Of the most common arrests, operating under the influence (OUI) and third-degree retail fraud (lowest-level shoplifting) fell by over thirty percent, while arrests for failure to appear and simple assault declined modestly.

Failure to appear was the most common reason for arrest, after recent declines in OUI.



Source: Michigan State Police. See 'Arrest data'' in *Data Sources and Methods*.

In contrast to this overall trend were notable increases in arrests for probation violations and possession of methamphetamine, heroin, and narcotic equipment. While arrest numbers fell for men and white women, arrests for black women did not. The decline in arrests of black women for third-degree retail fraud and disorderly conduct was offset by increased arrests for failure to appear and simple assault.

Appearance tickets

Michigan law gives officers discretion to issue criminal citations in lieu of arrest for some low-level misdemeanors (those that are eligible for sentences of up to 93 days in jail). The law offers no guidance on when to cite versus arrest and no guidance on the use of alternatives like pre-arrest deflection and post-arrest diversion.[11] Data from the Michigan State Police, which excludes most traffic offenses, shows criminal citations were utilized in 10 percent of arrest events in 2018. The other 90 percent were on-view arrests or arrests made pursuant to a warrant. (If traffic misdemeanors were included in the arrest data, this 10 percent figure would be higher.) For some common misdemeanors eligible for criminal citation (such as disorderly conduct and third-degree shoplifting), officers issued citations 20 to 25 percent of the time, and otherwise made custodial arrests.

Among common low-level misdemeanors, citations were used about ¼ of the time.

Source: Michigan State Police. See 'Arrest data' in *Data Sources and Methods*.
Note: Data does not include most traffic offenses.

Importantly, the law does not authorize criminal citations for all misdemeanors or for any felony charges, so officers could not issue citations under current law for many of the arrest events in the data.

At roundtables of patrol officers and corrections deputies, the Task Force heard that arresting and booking someone into jail is a time-consuming process, often taking several hours. Issuing an appearance ticket, on the other hand, was described as significantly faster, with the additional benefit of allowing the officer to remain in the community instead of traveling to the jail. Considering the varying public safety priorities officers manage, the ability and discretion to issue citations was considered a valuable tool for law enforcement to manage their time and resources.

[10] Also called appearance tickets.
[11] Deflection and diversion generally refer to practices that connect individuals to services outside the criminal justice system. If this re-routing occurs before arrest, it is often called deflection, and if it occurs after arrest it is called diversion.

Traffic offenses

Some of Michigan's traffic violations (such as careless driving and speeding) are civil infractions, meaning they are against the law and punishable with fines, but do not themselves directly lead to arrest or jail.[12] Other traffic violations are criminal offenses eligible for arrest and jail, including common charges like driving without insurance or driving with a suspended license. Even excluding operating under the influence, these criminal traffic offenses account for six of the top ten most common charges handled by courts.[13] Driving without a valid license was the third most common reason for jail admission in the Task Force's 20-county sample.

In Michigan, a person can have their driver's license suspended for a wide variety of reasons, many unrelated to driving safety, such as failing to appear in court or conviction for controlled substance offenses. In 2018, nearly 358,000 licenses were suspended for failure to appear and failure to pay fines and fees.[14]

Traffic violations made up ½ of all criminal cases.

Source: Criminal cases disposed in court, 2018. See 'Court Data' in *Data Sources and Methods.*

[12] Civil infractions can indirectly lead to arrest or jail if an individual does not appear in court, fully pay fines or fees, or meet any other court conditions.
[13] Criminal cases disposed in court, 2018. See 'Court Data' in *Data Sources and Methods.*
[14] Fines and Fees Justice Center, *Free to Drive*. Retrieved from https://www.freetodrive.org/maps/#page-content.

How long are people staying in jail?

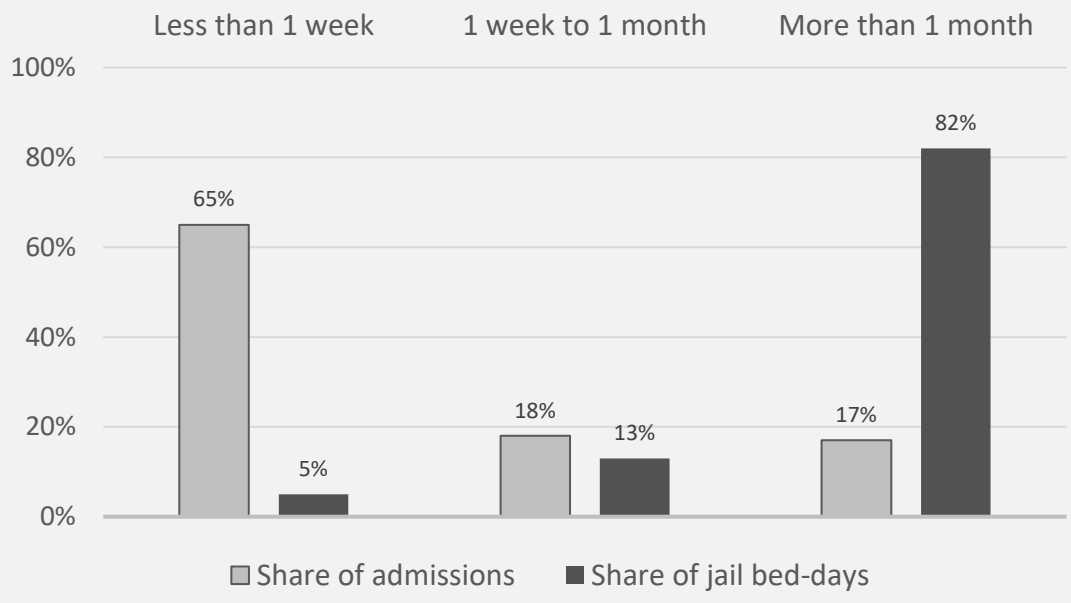
County jails are high traffic institutions and impact many more individuals than state prisons.[15] A short period of jail incarceration can prevent an immediately dangerous situation from escalating, enable the court to evaluate conditions of release, and allow a person who has been victimized to plan for their safety. The value of that temporary incapacitation must also be balanced against an individual's constitutional liberty interest and empirical research (described and cited further in the next section of this report) showing that even short periods of incarceration can increase the likelihood of future criminal behavior. Short periods of detention can also have far-reaching impacts on a person's employment, housing, and dependent children.

Among the Task Force's diverse sample of 20 jails, two-thirds of those admitted to jail stayed less than a week. Because their stays were short, they accounted for a small portion of the total jail beds filled between 2016 and 2018 (jail bed days). As a group, they represent a large number of people who experienced jail incarceration, but didn't account for very much of the total jail space used—only five percent. At the same time, a relatively small portion of jail admissions—17 percent—stayed longer than a month (including some who stayed a year or longer), and this group accounted for 82 percent of the jail bed days. (See the figure below.)

Policymakers in Michigan aiming to address jail incarceration, therefore, have two separate cohorts to address: (1) the large number of people whose lives are disrupted by short jail stays, and (2) the relatively small group whose long stays drive up jail populations.

Most people stayed in jail less than a week, but the 1 in 5 who stayed longer than a month took up nearly all the jail space.

Share of admissions and share of jail bed days by length of stay



Source: Sample of jails, 2016-2018. See 'Jail Data' in *Data Sources and Methods.*

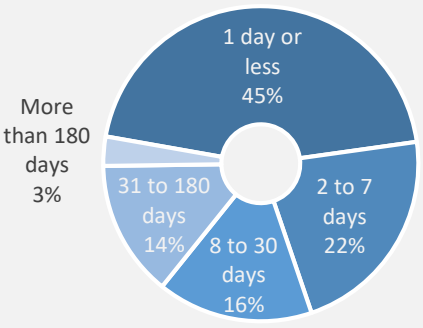
[15] In 2017, there were 10.6 million admissions to jail in the U.S. compared to 606,500 admissions to state and federal prisons. Bureau of Justice Statistics, *Prisoners in 2017* (2019); Bureau of Justice Statistics, *Jail Inmates in 2017* (2019).

Wide range in length of jail stays

Among the Task Force's sample of 20 diverse jails, those in jail for a felony on December 1, 2018 had been there for an average of 115 days, and those in jail for a misdemeanor had been there for an average of 72 days. Because of the longer lengths of stay for those charged with, or sentenced for felonies, nearly three-quarters of the jail population on December 1, 2018 was in jail for a felony offense. By contrast, when looking at length of stay for all those who came in and out of jail between 2016 and 2018—including the large portion who cycled through quickly—the average lengths of stay were 45 days for felony offenses and 11 days for misdemeanor offenses, again including both the pretrial and sentenced population. These averages, however, comprised a wide range. For example, three percent of those released from jail between 2016-2018 had spent more than six months detained and 14 percent had spent one to six months, while at the other end of the spectrum, 45 percent were admitted and released within one day. (See the figure below.)

Nearly half of admissions stayed 1 day, but some stayed longer than 6 months.

Share of jail admissions by length of stay



Source: Sample of jails 2016-2018. See 'Jail Data' in Data Sources and Methods.

Among some of the most common offenses:[16]

- 58 percent of those jailed for drug possession or use stayed in jail for two days or more and 16 percent stayed longer than a month.
- 40 percent of those jailed for operating under the influence stayed in jail for two days or more and 10 percent stayed longer than a month.
- 36 percent of those jailed for driving without a valid license stayed in jail for two days or more and five percent stayed longer than a month.

[16] Sample of jails 2016-2018. See 'Jail Data' in *Data Sources and Methods*.

WAYNE COUNTY SPOTLIGHT

On October 17, 2019, Task Force members were invited to a presentation on preliminary findings from the Wayne County Jail Population Advisory Committee. The Committee received support from the Hudson-Weber Foundation and technical assistance from the Vera Institute of Justice. The Committee analyzed Wayne County jail data and found that:

- The most common charges at admission were misdemeanor driving offenses, felony assault, and child support violations.
- More than 10 percent of jail admissions were for probation violations with no new criminal charge filed.
- Felonies accounted for about half of the admissions and more than three-quarters of the jail population on any given day.
- Black people represented 39 percent of the county resident population but 70 percent of those detained in the jail on any given day.

Pretrial findings included:

- One in three people admitted to jail pretrial was released with a monetary bond. About one in five were released on an electronic monitoring device. And only one in twenty-five were released on personal recognizance.
- More than 40 percent of those with bail set between $2,500 and $10,000, and 38 percent of those with bail set at or below $2,500, remained in jail until the resolution of their cases.

Source: Presentation from the Vera Institute of Justice on October 17, 2019 at Wayne State University Law School. Note: Data includes bookings into Wayne County jail between June 30, 2018 and July 1, 2019.

Pretrial detention in jail

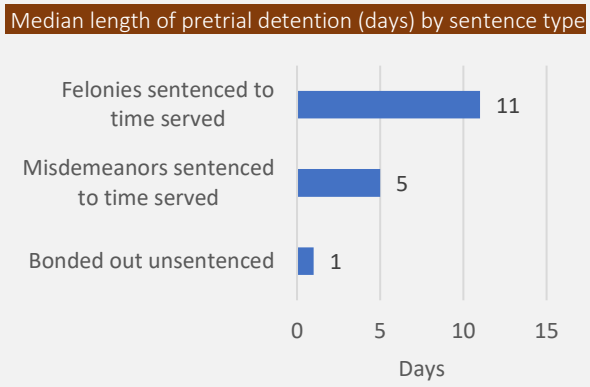
Of those in the Task Force's 20-jail sample who were released from jail because they posted bond, most did so within 24 hours. A third spent at least two days in jail prior to release.[17]

However, the group of those *released* from jail were not the only ones who experienced pretrial detention. Those unable to post bond or ordered detained pretrial remained in jail until they were sentenced or their case was dismissed.

Roughly a quarter of people sentenced to jail statewide were sentenced to 'time served', meaning they were not required to spend any additional time in jail but were credited for the time they already served and then released. The length of pretrial detention for this group averaged five days for misdemeanors and 11 days for felonies.[18]

Some pretrial stays in Michigan are very long. On a site visit to the Genesee County jail, for example, Task Force members met with three people who had each been held in jail for two to four years pretrial.[19]

Length of pretrial detention depended on whether the defendants posted bond.



Source: Sample of jails 2016-2018; OMNI and Judicial Data Warehouse, 2018. See 'Court Data' in *Data Sources and Methods*.
Note: Days of jail credit was used as proxy for length of pretrial detention of misdemeanors and felonies sentenced to time served in 2018.

The length of time someone spends in jail pretrial is determined by state and federal constitutional provisions, state laws and court rules, and local orders and cultural norms. The Task Force found wide variation in practices related to pretrial release conditions. Interim bond amounts for use of a controlled substance, for example, ranged from $0 (personal recognizance release) to $20,000. Some courts required all pretrial defendants to submit to drug testing or electronic monitoring while others used these types of conditions more sparingly.[20]

RURAL JAIL GROWTH

Jail populations have grown faster in rural counties than in urban or suburban areas. In 1978, rural counties in Michigan held 15 percent of the state's jail population, but by 2013 that share had increased to 24 percent. This trend is not unique to Michigan. Nationally, pretrial incarceration rates in rural counties grew 436 percent between 1970 and 2013, and rural counties now have the highest pretrial incarceration rates in the country.

This growth in rural jails is partly driven by the increased share of the jail population that is held for other authorities, such as the state department of corrections, the federal government, or other counties. In Midwestern states, recent data shows that one in four people in rural jails are held for other authorities, compared to just one in nine in the 1970s. Research also suggests that jail growth in rural counties is partly driven by a lack of resources that could provide alternatives to jail.

Source: Vera Institute of Justice, "Out of Sight: The Growth of Jails in Rural America" (2017). Bureau of Justice Statistics, Annual Survey of Jails and Census of Jails. See 'Jail Data' in *Data Sources and Methods*.
Note: The most recent year of the Census of Jails is 2013.

[17] Sample of jails 2016-2018. 'Posting bond' includes those released on personal recognizance. See 'Jail Data' in *Data Sources and Methods*.
[18] Days of jail credit were used as a proxy for length of pretrial detention. Convictions sentenced in 2018 from OMNI data and the Judicial Data Warehouse. See 'Court Data' in *Data Sources and Methods.*
[19] For more information see https://www.detroitnews.com/story/opinion/columnists/nolan-finley/2019/12/11/finley-genesee-county-jail-contends-with-complex-overcrowding-delays/4385554002/.
[20] State Court Administrative Office survey of district courts in July of 2019 regarding pretrial practices. Interim bond analysis relied on 23 district courts which provided their standing interim bond orders as part of the survey.

Jail sentence length

In 2018, more than 100,000 people in Michigan were convicted and sentenced to a jail term. About 40 percent of misdemeanor sentences and nearly 60 percent of felony sentences involved a sentence of jail or jail followed by probation.[21] Average jail sentences were longer for felonies (six months for jail and four months for jail followed by probation) than for misdemeanors (just over one month for jail and almost two months for jail followed by probation). [22]

Current Michigan law provides no guidance on when probation or another jail alternative should be the preferred or presumed sentence. Michigan's felony sentencing guidelines, for example, designate categories of cases in which "intermediate sanctions" are appropriate, but defines that term broadly to mean jail, probation, or a combination of the two. All misdemeanors are defined in law by the maximum allowable jail sentence, without reference to whether the sentence should generally or usually be jail or an alternative like probation, a fine, or community service.[23]

Probation and parole violations

Nearly 10 percent of people in Michigan's jails were detained for probation or parole violations. Probationers and parolees can be drawn into jail in response to technical violations (defined as most behavior short of a new crime) or new criminal behavior, although the data available did not distinguish the type of violation or level of seriousness. Overall, more than half of people who came to jail on probation or parole violations stayed longer than a week, and a quarter stayed more than a month.[24]

Michigan has the sixth highest rate in the country of people under community supervision (probation or parole) and the seventh highest rate of people under any correctional control (people either under community supervision or incarcerated).[25] The maximum length of probation in Michigan is five years—a common limit for some states but notably longer than others. Washington, for example, caps probation for felonies at two years.[26]

Michigan has the 6th highest rate in the country of people on community supervision.

Source: U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2015* (2016). Note: The most recent year including Michigan data is 2015. The rate is calculated based on residents age 18 or older.

[21] Felony dispositions are from Michigan Department of Corrections, *Statistical Report 2018.* Misdemeanor dispositions are from the Judicial Data Warehouse. See 'Court Data' in *Data Sources and Methods.*
[22] Felony dispositions are from OMNI data and do not include statutorily sealed convictions. Misdemeanor dispositions are from the Judicial Data Warehouse. See 'Court Data' in *Data Sources and Methods.*
[23] Michigan Judicial Institute, *State of Michigan Sentencing Guidelines Manual* (May 2019).
[24] Sample of Michigan jails, 2016-2018. See 'Jail Data' in *Data Sources and Methods.*
[25] Kaeble, D. and L. Glaze, *Correctional Populations in the United States, 2015,* (2016). Bureau of Justice Statistics, U.S. Department of Justice
[26] Robina Institute of Criminal Law & Criminal Justice (2014). *Profiles in Probation Revocation: Examining the Legal Framework in 21 States* (Kelly Lyn Mitchell and Kevin R. Reitz, eds.). https://robinainstitute.umn.edu/publications/profiles-probation-revocationexamining-legal-framework-21-states.

Is jail an effective intervention?

On August 23, 2019, the Task Force heard a presentation from Dr. Jennifer Copp, Director of the Jail Research and Policy Institute at Florida State University, that summarized relevant research on the effectiveness of pretrial detention, money bail, and jail sentences. Studies cited in this section are listed as endnotes in *Research References.*

Pretrial detention

While temporary incapacitation can prevent escalation of dangerous situations and offer respite and peace of mind for victims in immediate danger, research suggests that jail detention has a number of negative impacts that can destabilize individuals and increase future offending.

Detained defendants face potential consequences as a result of their pretrial incarceration that impact their employment, residential stability, and family. A study evaluating individuals on pretrial supervision found that those detained for three days or longer were more likely to experience residential difficulties and to report negative impacts of detention on their dependent children relative to those detained pretrial for less than three days.[i] Jail incarceration generally, whether pretrial or sentenced, has been found to worsen individual labor market outcomes and increase reliance on government assistance.[ii] Pretrial detention also affects families and acquaintances of those detained, especially when those individuals are paying for a defendant to be released pretrial. A study conducted in New Orleans found that low-income families and other individuals (e.g., friends and acquaintances) are often forced to make difficult financial choices (e.g., paying for rent or utilities versus paying for bail) when trying to pay for a loved one's money bail or other criminal justice costs.[iii]

Studies find the temporary benefits of incapacitation are offset by increased future offending.

In addition to collateral consequences, a growing body of research has examined the impact of pretrial detention on future criminal justice outcomes. A study in New York City showed that while pretrial detention temporarily reduced offending through incapacitation, it increased arrests after the person was sentenced.[iv] This suggests the short-term benefits of detention may be offset by long-term public safety consequences.

Research has shown that being detained pretrial (controlling for a number of important case and defendant characteristics) increases the likelihood of pleading guilty,[v] receiving a jail or prison sentence,[vi] and receiving a longer sentence.[vii] One study found that low-risk defendants detained pretrial were approximately five times more likely to be convicted and sentenced to jail when compared to similarly situated released defendants.[viii]

VICTIM/SURVIVOR NEEDS AND PRIORITIES

In October, the Task Force hosted roundtable discussions with more than 50 victim advocates, survivors, and service providers across the state. Some of the key messages communicated were:

- The experiences and testimony of crime victims and survivors in Michigan are essential to understanding and reforming the criminal justice system. Data cannot always reflect the nuances and circumstances of criminal cases.
- Crime victims need comprehensive trauma-informed services and support from initial law enforcement interaction through prosecution and beyond. Shelters, transitional housing, counseling, and needs-assessments require additional funding.
- Bond conditions issued by a criminal court should be communicated to any civil court issuing a personal protection order involving the same person and vice versa. Bond orders and conditions should also be entered into the Law Enforcement Information Network (LEIN).
- Prosecutors should determine the appropriate parameters of no contact or stay away orders necessary to protect victims during the pretrial period and should address protection order violations when they occur.
- Efforts are needed to improve restitution management to help victims recover losses.

In addition to defendants, law enforcement and corrections officers are impacted by the use of pretrial detention. The decision to arrest and book someone into jail is often made by law enforcement, but their actions are dependent on the availability of alternatives to jail and the discretion the law affords them to use those alternatives. While alternatives to custodial arrests need further study, some evidence has shown promising benefits (e.g., reducing police costs and time) for deflection and diversion programs,[ix] civil citations in lieu of criminal system involvement, and criminal citations in lieu of arrest.[x]

Money bail

When evaluating pretrial failure for those released, measurable outcomes include whether an individual fails to appear in court or is rearrested during the pretrial period. Of particular interest to many researchers is whether financial conditions of release are more or less effective than non-financial conditions in motivating individuals to comply pretrial.

Several studies have found that money bail is not more effective than release on recognizance for certain types of defendants (e.g., low-risk defendants). For defendants in New York City categorized as low-risk, money bail did not significantly improve court appearance rates.[xi] A study evaluating a newly implemented policy in Philadelphia that stopped district attorneys from requesting money bail for certain low-level felonies and misdemeanors found that increasing the number of defendants released pretrial without monetary conditions resulted in no significant increase in failures to appear or rearrests.[xii] Two Colorado-based studies found that *secured* bonds (bonds requiring upfront payment for release) were no more effective than *unsecured* bonds (bonds requiring no upfront payment) at ensuring court appearance or public safety (measured as a new crime, court filing, or re-arrest during pretrial release).[xiii]

While a few studies have focused specific attention on commercial surety bonds, finding commercial bonds to be more effective than other release mechanisms,[xiv] these studies rely on data that the Bureau of Justice Assistance has cautioned against using when making comparisons across pretrial release types.[xv]

Finally, money bail has been found to negatively impact the outcome of an individual's case. A study in Philadelphia found that the assignment of money bail alone led to an increase in guilty pleas, convictions, and recidivism.[xvi]

Jail sentences

Overall, the available research consistently suggests that sentences to incarceration (both jail and prison) are ineffective at reducing future offending, with some studies indicating they may in fact increase criminal behavior.[xvii] Of the limited research available on alternatives to incarceration, evidence suggests that probation may be more effective than jail sentences at reducing recidivism.[xviii] The evidence on other jail alternatives like community courts, community service, day reporting, and day fines remains mixed and/or insufficient to draw meaningful conclusions about their effectiveness relative to sentences of incarceration.[xix]

Studies comparing the effectiveness of custodial and non-custodial sentences for violations or revocations of probation and parole remain limited. However, research suggests that jail is no more effective, and may be less effective, than community sanctions at reducing subsequent violations and reoffending for those on intensive supervision, both for substance use violations[xx] and any violation type.[xxi] A Washington State study showed that confinement of up to 60 days, when used as a sanction for technical violations, does not decrease felony recidivism as compared to non-jail sanctions.[xxii]

What limits does the Constitution place on pretrial incarceration?

A recent wave of litigation across the country has produced court rulings ordering thousands of people released from jail, because pretrial practices in those jurisdictions had evolved in ways that violated the constitutional guarantees of due process and equal protection. One such lawsuit was filed and remains pending in Michigan. In August, the Task Force heard expert testimony explaining that the primary problems courts have been finding are that 1) people are not getting meaningful hearings about whether they should be released or detained pretrial, and 2) when access to money is the deciding factor between those who get released and those who get detained, poor people are denied equal protection of the laws.

The Constitution places many limits on pretrial incarceration. The country's founding fathers emphasized individual liberties and freedom by prohibiting the deprivation of life, liberty, or property without due process of law. Among these, the freedom from bodily restraint is "the core of the liberty protected… from arbitrary government action."[27]

> "In our society, liberty is the norm, and detention prior to trial… is the carefully limited exception."
>
> Source: United States v. Salerno, 481 U.S. 739 (1987).

Every individual facing criminal prosecution is afforded the presumption of innocence and the right to freedom before conviction.[28] The Supreme Court has ruled that, in our society, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception."[29] Unless the right to pretrial release is preserved, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[30]

Due process and excessive bail

Individualized decisions. To be constitutional, bail must not be predetermined based on offense categories, but individually tailored for the purpose of assuring the defendant's presence at trial.[31] Non-financial conditions of release should also be used flexibly and vary with the needs and circumstances of the individual defendant.[32]

Least restrictive measures. Fundamental liberty interests must not be infringed unless narrowly tailored to serve a compelling state interest.[33] The Constitution prohibits conditions of release or detention that are excessive in light of the perceived evil.[34]

Process requirements. Fundamental fairness requires liberty only be deprived after notice and the opportunity to be heard before a neutral party.[35] In the context of bail, defendants are entitled to a hearing within 48 hours of their detention.[36] The court may only continue detention if it finds no other reasonable way to assure pretrial compliance.[37]

Equal protection

The Constitution's guarantee of equal protection of the laws prohibits governmental actions that discriminate between certain classes of individuals, including those with and without access to money, and imposes varying levels of scrutiny upon appellate review. In the context of incarceration, federal courts have found that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[38]

[27] *Foucha v. Louisiana*, 504 U.S. 71 (1992).
[28] *Stack v. Boyle*, 342 U.S. 1 (1951).
[29] *United States v. Salerno*, 481 U.S. 739 (1987).
[30] *Stack v. Boyle* (1951).
[31] *Id.*
[32] *Cohen v. United States*, 82 U.S. 526 (1962).
[33] *Reno v. Flores*, 507 U.S. 292 (1993).
[34] *United States v. Salerno*.
[35] *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532 (1985); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[36] *See O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018).
[37] *Id.* Many federal courts have required this finding to be made using the standard of clear and convincing evidence. See *Caliste v. Cantrell*, 329 F.Supp.3d 296 (E.D. La. 2018); *Shultz v. State*, 330 F.Supp.3d 1344 (N.S. Ala. 2018).
[38] *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).

What is jail costing taxpayers?

In 2017, Michigan taxpayers spent at least $478 million on county jail and corrections costs.[39] This includes operating costs such as staffing and medical care but not capital projects, like construction of new facilities. At least a few counties each year also take on tens or hundreds of millions more in debt for new jail construction or facility improvements. Construction is currently underway in Wayne County for a new jail and criminal justice complex estimated to cost over $500 million, while Alpena County approved just more than $10 million for a new jail.[40]

Jails account for roughly a quarter of county-level spending on public safety and justice systems (including law enforcement, courts, and other judicial or public safety spending), which together are the third largest expenditure at the county level, behind health care and public works.

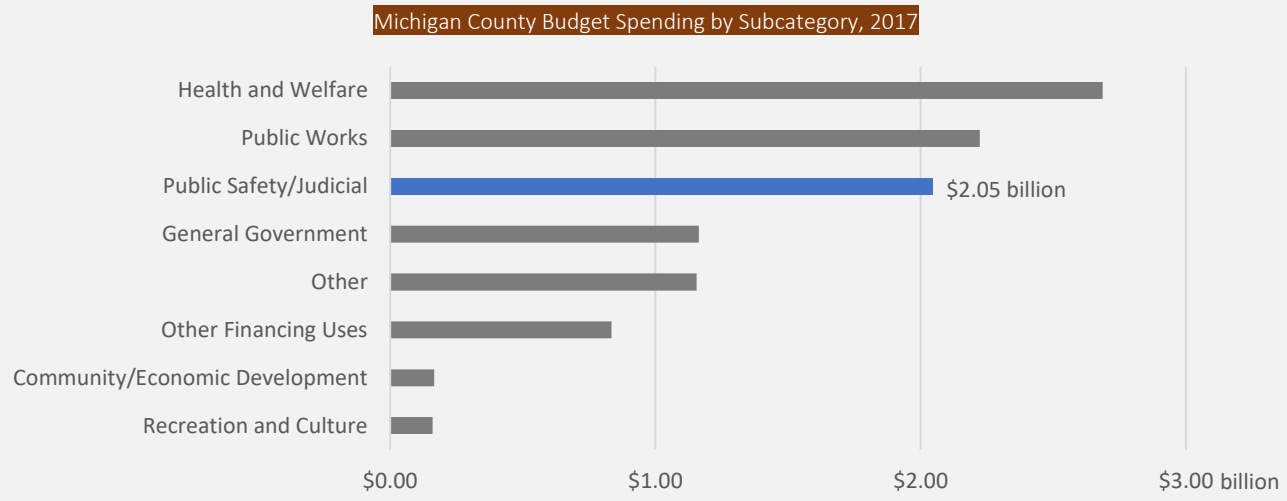
Trial courts cost nearly one and a half billion dollars to operate each year and over $630 million is funded through local sources.[41]

Taxpayers spent at least **$478 million** on county jail and corrections costs in 2017.

Source: Michigan Department of Treasury, Community Financial Dashboard. See 'County budget data' in *Data Sources and Methods.*

Criminal defendants also pay to support operations of jails and courts. In addition to victim restitution and fines, criminal sentences in Michigan often come with fees and costs related to court processes, jail stays, community supervision, and conditions or programming ordered as part of supervision. Criminal defendants pay over $418 million annually in fines, fees, court costs, and restitution.[42]

The justice system is the third largest county expenditure.



Source: Michigan Department of Treasury, Community Financial Dashboard. See 'County Budget Data' in *Data Sources and Methods.*

[39] Michigan Department of Treasury, Community Financial Dashboard. See 'County Budget Data' in *Data Sources and Methods.*
[40] In 2017, Alpena County approved construction of a new jail budgeted at $11 million (See https://www.thealpenanews.com/news/local-news/2019/10/why-the-county-is-building-a-different-jail-than-voters-bought/); In 2019, Macomb County officials considered funding construction of a new jail at $371 million (See https://www.freep.com/story/news/local/michigan/macomb/2019/12/04/macomb-county-elected-officials-give-vision-2020/2612374001/); In Wayne County, construction is currently underway for a $533 million jail and criminal justice complex (See https://www.detroitnews.com/story/news/local/detroit-city/2019/06/25/wayne-county-takes-second-swing-building-new-jail/1271683001/).
[41] Michigan Trial Court Funding Commission, *Trial Court Funding Commission Final Report* (2019).
[42] Ibid. Court assessments are defined as all monies authorized by statute to be paid to the court and include restitution, fees, fines, and court costs.

Recommendations: Policy Goals & Solutions

Based on the review of data, research, and input from key stakeholders, the Task Force divided into subgroups for further analysis and discussion of three key areas of focus: arrest and arrest alternatives; pretrial release and detention; and sentencing, probation, and parole. Each subgroup met a minimum of four times and invited experts within their area of focus to provide additional information and support. Task Force members have been appointed for terms ending on September 30, 2020 and will continue work and outreach with stakeholders in the intervening time to prepare for implementation and performance monitoring of the recommended reforms. All recommendations that come with an implementation cost should comply with the Headlee Amendment in Michigan's constitution.

Unless otherwise noted, the data, research, and testimony referenced within the recommendation is described in earlier sections of the report.

Traffic violations

Recommendation 1: Reduce the number of driver's license suspensions.

State law allows a driver's license to be suspended for a wide range of non-criminal behaviors. In 2018, nearly 358,000 licenses were suspended in Michigan for failure to appear and failure to pay fines and fees. The Task Force heard testimony across the state about the domino effect a suspended license can have, and from the law enforcement professionals who see these individuals using up limited public safety resources. To reduce jail admissions for driving with a suspended license and remove barriers to workforce reentry, licenses should only be suspended or revoked when the holder has been convicted of an offense directly related to driving safety.

<u>The Task Force recommends:</u>

a. Eliminating suspension and revocation of driver's licenses as a possible sanction except for conviction of specific moving offenses directly related to driving safety, such as reckless driving, operating while intoxicated, and fleeing and eluding an officer.
    - License suspension or revocation should never be allowed for failure to comply with a court judgment, including failure to appear and failure to pay fines and fees.
    - Confiscation of driver's licenses as a condition of pretrial release should be prohibited except in cases where license suspension would be an allowable sanction upon conviction.
    - Reinstatement fees should be waived and a straightforward process created for immediate reinstatement of licenses suspended for reasons that are no longer eligible.

Recommendation 2: Reclassify some misdemeanors as civil infractions.

Most arrests across the state are for non-person offenses, the majority of which are misdemeanors. Members of law enforcement expressed significant concerns about the time it takes to conduct an arrest and booking even for a minor crime, often removing an officer from the street for several hours.

The Legislature's intent when creating civil infractions was to serve as a practical resolution to the costs and time involved in processing certain misdemeanors through criminal courts. To reduce jail admissions for infractions that are the lowest threats to public safety and that are already routinely addressed with fines, certain low-level misdemeanors should be reclassified as civil infractions, which are not eligible for arrest. Removing common low-level violations from arrest eligibility would preserve law enforcement time and resources, limit the costly use of jail for minor infractions, and reduce the number of people with criminal records.

The Task Force recommends:

Reclassifying some misdemeanors as civil infractions, including: non-moving traffic misdemeanors; most snowmobile, off-road vehicle, and marine safety misdemeanors that are not related to operating while intoxicated; most Department of Natural Resources misdemeanors; and most animal-related misdemeanors, except those related to animal cruelty or animals causing injury. Local jurisdictions should be required to align their own ordinances with these statutory changes.

Arrest

Recommendation 3: Expand officer discretion to use appearance tickets as an alternative to arrest.

Officers have discretion under the law to issue criminal citations, also known as appearance tickets, for misdemeanors punishable by 93 days of incarceration or less,[43] yet the law does not currently extend officers the same discretion for other misdemeanors.

Law enforcement leaders and patrol officers expressed their desire to Task Force members and staff for broader discretion to use appearance tickets in lieu of arrest, because expanding eligibility for criminal citations provides them with additional tools to manage their time, resources, and public safety priorities. Enacting a presumption that citations be used for the least serious misdemeanors further signals to officers that the state encourages arrest alternatives in those instances, while preserving their authority to make an arrest when public safety demands it.

The Task Force recommends:

a. Expanding officer discretion to issue criminal citations for all misdemeanors, excluding offenses involving domestic violence.[44]
b. Enacting a statutory presumption of citation in lieu of arrest for 90- and 93-day misdemeanors (except assaultive, domestic violence, and stalking misdemeanors); low-level property misdemeanors (where the value of the loss or damage is $200-$999); 90-day disorderly person misdemeanors; and controlled substance use misdemeanors. (Note that controlled substance *use* is a less serious offense under current law than *possession* of a controlled substance.)
    - To depart from the presumption and make an arrest, the officer would have to identify the reason on the arrest record.
    - The Uniform Law Citation form should be modified to include permitted reasons for departing from the presumption. It should also be modified to include an entry for the defendant's cell phone number, to enable court clerks to issue text message court reminders when a citation was used in lieu of an arrest.
    - The police report should be provided to the prosecuting agency within 48 hours of issuing a citation on weekdays, and within 72 hours of issuing a citation on weekends and holidays.
    - This presumption will shift the main entry point into the criminal justice system from jails to courthouses. Due consideration must be given to the facility, technology, and human resources needs of the courts as a result.
c. Requiring the Michigan State Police to collect and report data on the use of citation and arrest for all cases, including all traffic cases.

[43] Except domestic violence misdemeanors and violations of personal protection orders.
[44] As that term is defined in MCL 400.1501(d).

d. Requiring the Michigan Commission on Law Enforcement Standards, the Michigan Sheriffs' Association, and the Michigan Association of Chiefs of Police to collaborate on a plan to inform and educate arresting officers about the change to citation laws, and to report the plan to the legislature within 6 months of the statutory change.

Recommendation 4: Reduce arrests for failure to appear and failure to pay by changing how and when arrest warrants are used.

Failure to appear is the most common reason for arrest in Michigan. Across the state, bench warrants are issued as a matter of course when individuals fail to appear for court hearings or fail to pay fines and fees. To preserve law enforcement resources for more significant threats to public safety, and to reduce jail admissions for failures to appear and failures to pay financial obligations, summonses in lieu of warrants should be the norm rather than the exception.

The Task Force recommends:

a. Reducing the use of bench warrants for failures to appear and failures to pay court fines, fees, and child support.
    - Failure to appear should be removed as an independent offense from the criminal code or reclassified as a civil infraction.
    - The law should prohibit arrest warrants for first-time failure to appear for a *civil* citation or traffic case, or for first-time failure to appear for a show cause hearing following failure to pay court fines, fees, or child support.
    - A presumption should be established that a summons be used in lieu of an arrest warrant for first-time failure to appear on a *criminal* citation and on non-assaultive/non-person charges.
b. Creating a 48-hour grace period before a bench warrant may be issued to allow a person to voluntarily return to court following a first-time failure to appear, unless the defendant is charged with a new crime, there is evidence that the person has absconded to avoid prosecution, or the failure to appear is on a trial date.
c. Authorizing people with open warrants to appear during regular court hours within a year of the warrant being issued to reschedule their appearance without fear of arrest, except in cases where the warrant is for an assaultive offense or serious felony. Courts should offer alternatives to physically appearing in court for certain cases, such as through Polycom, which is available in every court in the state.
d. Requiring an individual who is detained on a an out-county Michigan warrant to be released if the originating county does not make pick-up arrangements within 24 hours and provide pick-up within 48 hours, excluding assaultive and stalking offenses.
    - The legislature must establish minimum standards for communication between Michigan jurisdictions to enable these timelines to be met.
e. Establishing a statewide warrant initiative, directing or incentivizing district courts to:
    - Develop processes for defendants to resolve low-level cases by phone or online without appearing in court,
    - Allow individuals seeking information about their case, with some exceptions, to call without fear of being arrested, and
    - Recall open warrants that are older than five years for failures to appear (on civil and criminal citations and certain felonies and misdemeanors as determined by the legislature) and failures to pay fines, fees, and child support.

Behavioral health diversion

Recommendation 5: Divert people with behavioral health needs away from the justice system.

The Task Force heard testimony from a wide array of stakeholders regarding the need for funding and statutory changes to keep individuals with mental health and substance use needs from entering ("deflection") or staying in ("diversion") the justice system. Deflection and diversion resources are not available in all areas of the state, particularly rural communities, and statute offers no guidance on their use as arrest and jail alternatives.

Sheriffs expressed concern about long jail stays for those awaiting evaluation or restoration of competency to stand trial. Local experts have suggested that the number of competency evaluations for those in jail facing misdemeanor charges has significantly increased in the last decade, and average wait times for treatment far exceed the maximum allowable sentence for most misdemeanors. Although recent initiatives have shown some progress, given the Center for Forensic Psychiatry's limited staff resources and the strict statutory timetable for restoring competency, applying this process in misdemeanor cases is impractical. Many states are eliminating competency evaluation and restoration services in misdemeanor cases, because often these cases do not go to trial, and they strain county jail resources, delay restoration in felony cases, and often lead to further mental health deterioration while in jail.

<u>The Task Force recommends:</u>

a. Providing statutory authorization for and guidance on the use of deflection and diversion.
    - Law enforcement agencies should be authorized and incentivized to partner with treatment and community organizations on programs that: 1) *Deflect* individuals with behavioral health needs away from the justice system before arrest and into treatment or supportive services, and 2) *Divert* such individuals out of the justice system after arrest and into treatment or supportive services.
    - The law should presume pre-arrest deflection and post-arrest diversion for individuals identified as, or observed to be, experiencing a mental health or substance use disorder, with exceptions based on public safety and resource availability.
    - The relevant Michigan Department of Corrections Administrative Rules for Jails and Lockups should reflect any statutory changes.
    - The Michigan Sheriffs' Association should support its members with the implementation of a standardized mental health screening tool at intake. Jail management systems should identify past and current Community Mental Health clients and individuals with diagnoses of mental health disorders.
    - Individuals identified as appropriate candidates for diversion, with consideration for public safety, should be diverted from jail stays altogether or connected with in-house mental health services, where available. If urgent release is necessary, jail staff should work closely with Community Mental Health to facilitate appropriate discharge for persons with serious mental health issues. In the case of individuals with legal guardians or advocates, every attempt shall be made by law enforcement and the jail to contact/reunite them immediately to assist in connecting them with treatment providers and supportive housing.
    - The Governor and Michigan Department of Corrections should develop rules for enforcing compliance with implementation.
    - Community Mental Health and law enforcement agencies should set local standards to determine how best to dispatch law enforcement and clinicians to calls involving an apparent behavioral health need.
b. Dedicating significant funding to support local law enforcement agencies, service providers, and community organizations to establish and expand inter-agency deflection and diversion programs. The funding may be varied in its use through different state-county partnerships but should be standardized in its distribution across the state.
    - Funding should also support jail population monitors within sheriff's offices. This role would involve the regular review of jail rosters to identify candidates who could be safely diverted, including those with behavioral health needs.
c. Charging an existing or newly established body with collecting relevant data and offering further recommendations on deflection, diversion, telehealth, and services such as triage/drop-off centers, co-responder dispatch, and mobile crisis teams.
d. Changing the law to divert misdemeanor defendants rather than referring them for competency evaluation. (Several counties have already adopted Memoranda of Understanding to accomplish this locally.)
e. Providing state funding to support efforts aimed at reducing the wait time of individuals ordered to receive competency restoration, including funding and any needed legislation to support community-based restoration where appropriate, and to further study the competency restoration backlog.

Recommendation 6: Make the Jail Overcrowding Act proactive rather than reactive.

The County Jail Overcrowding State of Emergency Act, or "Jail Overcrowding Act," directs sheriffs to manage their jail population by identifying individuals in jail who may be suitable for release without endangering public safety. These procedures are implemented when jail populations are at or near the facility's capacity but should be implemented proactively to prevent dangerous overcrowding and preserve limited jail resources.

The Task Force recommends:

a. Clarifying the Jail Overcrowding Act to be proactive, authorizing sheriffs to work with courts to divert and release certain individuals at any point, not only when facing an overcrowding emergency.
    - This recommendation is premised on the availability of appropriate therapeutic placements in the community.
b. Authorizing and encouraging sheriffs to deny booking individuals with behavioral health disorders and others charged with misdemeanors or non-assaultive felonies who can safely be released with an appearance ticket or personal recognizance (PR) bond, regardless of overcrowding risk.
c. Retain the Act's requirement that the Michigan Department of Corrections and Michigan Sheriffs' Association submit an annual report to the legislature on the effect of the enumerated procedures.

Recommendation 7: Provide behavioral health crisis response training for law enforcement, dispatch, and jail officers.

Local law enforcement and corrections professionals across Michigan identified mental health as a primary challenge. While many agencies provide some level of relevant training, there is no statewide standard that officers receive de-escalation and crisis response training for encounters with individuals who have mental health and substance abuse needs. There is significant evidence to suggest that such training increases safety for both the individual involved and the responding officer, and broad consensus among stakeholders that individuals requiring behavioral health services are not well-served in a jail setting.

The Task Force recommends:

a. Establishing a directive that the Michigan Commission on Law Enforcement Standards (MCOLES) collaborate with behavioral health experts, and/or the Mental Health Diversion Council, to develop behavioral health and crisis response training standards for new and incumbent law enforcement officers that align with national best practices and research.
    - The Michigan State Police's State 911 Committee and the Michigan Sheriffs' Coordinating and Training Council (MSCTC) should collaborate with MCOLES to develop similar training standards for dispatch and jail officers, respectively, and a plan for statewide rollout that supports compliance for all law enforcement agencies. More than one training curriculum should be offered to agencies, with varied program lengths and modes of delivery, to enable agencies with limited resources to meet compliance. Consideration should be given but not limited to the training models endorsed by the Mental Health Diversion Council.
    - MCOLES should be authorized to provide proper incentive to both law enforcement agencies and officers to meet the requirements set forth in the MCOLES standards.
b. Providing sufficient startup and annual funding to MCOLES to develop, implement, and deliver such training, including issuing stipends to law enforcement agencies to support training, as needed.

The first 24 hours after arrest

Recommendation 8: Shorten the time people spend in jail between arrest and arraignment.

Federal and state court rulings are increasingly requiring a strict ceiling of 48 hours between arrest and the person's first appearance in court, leading many states (e.g., Texas, New Jersey) to codify this or a similar time limit in statute. Currently in Michigan, not all arrestees are seen by a judicial officer within 48 hours. Establishing a statutory time limit would bring Michigan in line with developing constitutional jurisprudence.

Interim bond schedules, initially created to enable speedy pretrial release for people charged with certain offenses, in many counties have had the opposite effect. Standing interim bond amounts are regularly continued for the duration of the case, even after it is clear that the person cannot raise the funds, extending detention for many people accused of low-level crimes. To address this, the legislature should establish a uniform process for pre-arraignment release for people facing certain charges.

The Task Force recommends:

a. Requiring that a person be arraigned by a judicial officer within 24 hours of arrest, a period which may be extended to 48 hours for good cause.
b. Establishing automatic pre-arraignment release on personal recognizance for most misdemeanors and some non-assaultive felonies, excluding offenses involving domestic violence.[45] Under this policy, a person could be detained until their blood alcohol level is below the legal limit, or until they are otherwise sober enough to be safely released.

Pretrial release and detention

Recommendation 9: Establish higher thresholds for financial and non-financial pretrial release conditions.

Currently, the release and detention decision in Michigan is largely governed by court rule. Money bail may be imposed for any criminal offense, and courts receive little statutory guidance on which pretrial conditions to impose. This has led to release and detention procedures that vary widely among the counties. People who may pose no danger to the community can be detained before trial on bond they are unable to post, even for relatively low amounts. Conversely, defendants charged with more serious or violent crimes, or who otherwise may pose a significant risk to the public pending trial, can be released if they can post the bond set by the court.

Across the country, courts are increasingly holding that defendants are not receiving individualized release conditions or meaningful pretrial detention hearings, in violation of the Constitution's guarantee of due process. These courts are further concluding that when money is the deciding factor between those released and those detained, defendants without access to resources are deprived of equal protection of the laws. To align Michigan with the growing consensus in the federal courts, the state's bail laws should be revised.

[45] As that term is defined in MCL 400.1501(d).

The Task Force recommends:

a. Establishing a tiered statutory framework for pretrial release, as follows:

Pretrial Release & Detention Framework	
Presumption of release on personal recognizance	• All defendants shall be released on personal recognizance or unsecured bond, with standard conditions, unless the court makes an individualized determination that the person poses a significant articulable risk of nonappearance, absconding, or causing bodily harm to another reasonably identifiable person or themselves.[46]
Threshold for additional non-financial release conditions	• If the person poses a significant, articulable risk of nonappearance, absconding, or causing bodily harm, the Court may impose the least restrictive non-monetary condition or conditions that reasonably address the risk. • In cases where a person only poses a risk of nonappearance, and not absconding or causing bodily harm, the court may not impose conditions that result in the defendant's detention.
Threshold for secured financial release conditions (money bail)	• The court may impose secured financial release (money bail) if the person poses a significant, articulable risk of absconding or causing bodily harm and is charged with: o a violent offense o a sex offense, or o another enumerated serious nonviolent or non-sex offense, including, e.g., witness intimidation and tampering, high level drug felonies, conspiracy to murder, terrorism offenses, and select "nonviolent" offenses against children, • and the court finds that no nonmonetary conditions will reasonably address the risk.
Threshold for detaining a person without bond	• The court may order a person detained without bond if they are charged with: o Murder, treason, first-degree criminal sexual conduct, armed robbery, kidnapping with the intent to extort, or o A violent felony committed when on community supervision related to a prior violent felony; or with 2 or more prior violent felony convictions in the preceding 15 years,[47] o Where the proof is evident or the presumption great, • and the person poses a significant, articulable risk of absconding, or causing bodily harm, and no other conditions of release adequately address the risk.

b. Establishing the following statutory definitions, for the purposes of bail:
   - "Abscond" means fail to appear with the intent to avoid or delay adjudication.
   - "Nonappearance" means failure to appear without the intent to avoid or delay adjudication.

c. Repealing laws requiring money bail for Friend of the Court charges and laws requiring money bail for other offenses.[48]

d. Requiring that the court conduct an inquiry into the defendant's ability to pay money bail, before imposing it. This inquiry shall allow the prosecutor, defense counsel, and the defendant the opportunity to provide the court with information pertinent to the defendant's ability to pay money bail.

e. Following implementation of the policy changes outlined above, ultimately transitioning to a pure detention-and-release system, similar to policy frameworks in New Jersey, New Mexico, the District of Columbia and the federal system, in which money bail may not be used to detain a person pretrial. This transition to a pure detention-and-release system will likely require a state constitutional amendment.

[46] The Task Force further recommends establishing additional limitations on detention for the risk of self-harm, including a requirement that peopled detained as a danger to themselves must be transferred, within 12 hours after jail booking following their initial appearance, to the most appropriate therapeutic environment outside of the criminal justice system.
[47] This standard mirrors language currently in Michigan's Constitution.
[48] MCL 552.631(3) and MCL 765a.

Recommendation 10: Provide a due process hearing for defendants who are still detained 48 hours after arraignment.

Federal courts have repeatedly held that pretrial detention, or conditions of release that result in detention (for example unaffordable money bail), may only be imposed following an individualized determination, based on clear and convincing evidence, that no less restrictive conditions will suffice.[49] A growing number of federal lawsuits across the country have determined that jurisdictions are not meeting this standard. Despite the best efforts of court personnel in many courts in Michigan, defendants in are often detained without this constitutionally required due process.

The Task Force recommends:

Establishing a statutory right to a due process hearing for all defendants detained pretrial, including the following elements:

- Timing: For all defendants who remain detained following arraignment, the court must conduct a detention hearing not later than 48 hours after arraignment. On its own motion or on motion of the prosecutor, the court may continue a detention hearing for not more than 72 hours for good cause. On motion of the defendant, the court must continue a detention hearing. With the consent of the parties, the court may conduct the detention hearing at first appearance, assuming the rights and standards below can be met.
- Rights: At a detention hearing, the defendant has a right to be represented by counsel, testify, present and cross-examine witnesses, review evidence introduced by the prosecutor, present evidence, and proffer information. The normal rules of evidence do not apply. Any statements by the defendant may be used at a future proceeding for the purposes of impeachment but not to prove guilt.
- Standard at the Detention Hearing: The court may not issue an order of pretrial detention or continue a condition of release that results in detention of an individual unless the court finds by clear and convincing evidence that the person poses a significant articulable risk of absconding or causing bodily injury, and no less restrictive conditions can reasonably address the risk.
- Appellate review: Establish a new subsection in Chapter 7 of the Michigan Court Rules (MCR) concerning pretrial release and detention appeals. The subsection should include an expedited timeline, requiring review within 14 business days of filing of the appeal. It should also include a requirement that the trial court generate a written statement of the court's findings and reasoning for every bond decision that results in detention.

Recommendation 11: Limit the use of restrictive pretrial release conditions.

Many jurisdictions in Michigan routinely impose requirements such as in-person check-ins, drug testing, electronic monitoring, and participation in programs and counseling, as standard conditions of pretrial release. Some courts even require all pretrial defendants to submit to drug testing or electronic monitoring. In many of those places, people are required to pay for their conditions of release and can end up incarcerated when unable to pay. While restrictive release conditions are appropriate for some defendants, practical and supportive conditions like court reminders and referrals to services have also been found to increase rates of pretrial success but are underused throughout the state.

The Task Force recommends:

a. Establishing a statutory requirement of court reminders, which have been found to significantly increase the likelihood of court appearance, and redesigning notification and summons documents to maximize clarity and legibility.
b. Defining pretrial release conditions that require drug testing, electronic monitoring, or in-person reporting as "significant restraints on liberty," and limiting when such restraints may be imposed.
    - Requiring that a court first consider whether practical assistance or voluntary supportive services can sufficiently address any pretrial risks in the individual case.
    - Establishing a 60-day limit on the amount of time that a significant restraint on liberty (e.g., electronic monitoring or drug testing) may initially be authorized as a condition of pretrial release, and requiring an in-court reassessment of the condition after 60 days, with a rebuttable presumption that it be lifted if the defendant has demonstrated compliance.

[49] See, e.g., *Walker* v. *City of Calhoun*, 901 F.3d 1245 (11th Cir., 2018).

- Limiting GPS monitoring to felony cases; misdemeanor assaultive, domestic violence, or sex offense cases; and misdemeanor cases where the defendant was convicted of an assaultive felony in the past five years or was previously convicted as a habitual offender pursuant to MCL 769.10. (Note: this recommendation applies only to GPS monitoring, and not to other forms of monitoring like an alcohol tether.)

c. Requiring that the government bear the costs of non-financial conditions of release ordered for indigent defendants and prohibiting detention due to a defendant's inability to pay for release conditions.
   - Establishing a uniform indigency standard for conditions of release to be used in every criminal trial court.
   - A defendant shall be considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, pay the costs of ordered conditions of release. Substantial financial hardship shall be rebuttably presumed if the defendant is eligible for appointment of counsel; receives or is eligible to receive public assistance based on financial hardship; has dependents who are eligible for such assistance; resides in public housing; earns an income less than 200% of the federal poverty guideline; has been homeless in the past six months; or is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility.

Speedy trial

Recommendation 12: Strengthen speedy trial laws.

Both the U.S. and Michigan Constitutions guarantee criminal defendants the right to a speedy trial, yet Task Force members met individuals who had been incarcerated for 3-4 years awaiting trial. Michigan's current case law sets a difficult standard for a defendant to successfully assert their constitutional right to a speedy trial. The state should require firm statutory trial deadlines and eliminate the requirement that incarcerated defendants actively assert their speedy trial rights.

The Task Force recommends:

a. Requiring that defendants be tried within 18 months of arrest, absent waiver, acquiescence, or agreement by the defendant.
   - Specifying that delays attributable to the defendant may not be held against the government for speedy trial purposes.
   - Creating meaningful consequences (e.g., dismissal with prejudice) for failure to try a defendant within the statutory time limits.
   - Revising court rules to accord with the new statutory speedy trial provisions.
   - Providing additional funding, as needed, to services supporting the criminal justice system and enabling it to meet these timelines (e.g., Michigan State Police Crime Lab and the Michigan Department of Health and Human Services' Center for Forensic Psychiatry).

b. Removing the requirement that defendants actively assert their speedy trial rights in order to preserve them. The law should instead require that speedy trial rights be preserved unless defendants or their counsel waive them explicitly on the record or implicitly by their conduct.

Alternatives to jail sentences

Recommendation 13: Reduce the number of people sentenced with jail time for misdemeanors.

Most jail admissions are for misdemeanor offenses, and while they tend to have relatively short stays in jail, the process of booking individuals takes up significant time and resources for law enforcement and can have detrimental consequences for the detained individual. The Task Force explored ways to reserve jail sentences for more serious criminal behavior and cases involving significant threats to individuals or the public. Because sentences to probation can also result in jail bed usage through sanctions for violations, the law should presume non-jail *and* non-probation sentences for less serious misdemeanors and eliminate mandatory jail sentences for all misdemeanors.

The Task Force Recommends:

a. Adopting a rebuttable presumption that people convicted of misdemeanors (except those defined as serious misdemeanors in MCL 780.811 or nonserious misdemeanors with a recent assaultive felony conviction) be sentenced with a fine, community service, or other non-jail, non-probation sanction.
    - The legislature should specify the findings a court must make on the record in order to depart from the presumption of a non-jail and non-probation sentence, noting that probation is appropriate as a sentence for non-serious misdemeanors only in cases with a specific rehabilitation goal and/or an articulable risk of harm to a victim (in which case jail could also be appropriate).
b. Eliminating existing mandatory minimum jail sentences for misdemeanor offenses and prohibiting the creation of new ones, including those established by local ordinances that are substantially similar to state misdemeanors.

Recommendation 14: Reduce the number of people sentenced with jail time for certain felonies.

Because people with felony charges stay longer in Michigan jails than those with misdemeanors, the majority of jail beds at any one time are occupied by people charged with or convicted of felonies. Felony sentences in Michigan are guided by advisory sentencing guidelines. For people who, by reason of their offense type, offense characteristics, and criminal history are recommended for an intermediate non-prison sanction, the sentencing grid offers no guidance for when a sentence to jail, probation, or a combination of the two is appropriate, and practice varies widely across the state. To better distinguish sentences of incarceration from community supervision and to increase consistency in sentencing practices across the state, the presumptive intermediate sanction should be probation. Other felony sentencing changes are also needed to better align penalties with the seriousness of the offense and the potential danger to the community.

The Task Force recommends:

a. Establishing a rebuttable presumption that people recommended for an "intermediate sanction" by the sentencing guidelines receive a probation sentence with no jail term included.
    - Intermediate sanctions for individuals determined to be in a "straddle cell" would remain eligible for a sentence of probation, jail, or a combination of the two.
    - The legislature should specify the findings a court must make on the record in order to depart from the presumption of a non-jail sentence.
b. Reclassifying or adjusting punishments for common lower-level felonies in the following ways:
    - Adjusting the thresholds for the monetary value of property theft, damage, or loss associated with different penalties as follows (preserving existing rules about penalty enhancements for repeat offenses) and adding the monetary thresholds to offenses that currently do not have them, including no-account checks and larceny in a building.

Level of Offense	Monetary Threshold
93-Day Misdemeanor	< $750
1-Year Misdemeanor	$750 - $2,000
5-Year Felony	$2,000 - $20,000
10-Year Felony	> $20,000

    - Reclassifying unlawful use of a vehicle and 4th degree fleeing & eluding as 1-year misdemeanors.
    - Reclassifying 1st degree retail fraud and possession of less than 25 grams of cocaine or narcotics as Class H felonies with maximum incarceration of 2 years.
    - Creating a new 90-day misdemeanor for resisting, obstructing, or opposing a law enforcement officer or other official performing their duty, when no physical force is used. If the individual assaults, batters, or otherwise uses physical force to resist or obstruct, the offense would remain a 2-year felony.
    - Reducing the maximum sentence for uttering & publishing a forgery to 5 years, in line with other Class E felonies.
    - Expanding judicial discretion by eliminating mandatory incarceration as a sentence for a 3rd or subsequent offense of operating a vehicle while intoxicated or impaired or with the presence of a controlled substance.

- Aligning threshold weights and punishments for possession of methamphetamine with other schedule 1 and 2 drugs.

c. Expanding the age of eligibility for the Holmes Youthful Trainee Act (HYTA) to include young people aged 24 and 25 to align with established research about adolescent brain development. The age at which prosecutors must approve the use of HYTA should be raised to 24.

d. Directing a new or existing body to study and recommend policy changes to reduce the number of people held in jail for failure to pay child support.

Probation and parole

Recommendation 15: Limit exposure to jail for those on probation and parole supervision.

Michigan has one of the highest rates of community supervision in the country, and probation and parole violations are among the top 10 offenses admitted to jail. Current statute in Michigan allows for probation terms of up to five years for most felonies and up to two years for most misdemeanors, but evidence indicates that focusing resources on the first weeks and months of a person's supervision term provides the greatest public safety return on investment.[50] Research also indicates that sanctions for probation violations are most effective when they are swift, certain, and proportional, and that community-based sanctions are as effective as incarceration at reducing future violations.[51]

The state should focus resources on the highest risk periods of supervision, incentivize compliance to improve success rates on community supervision, and reduce inconsistencies across courts related to early discharge from probation.

The Task Force recommends:

a. Tailoring statutory maximum probation terms to the period of time when violations are most likely to occur and when probation supervision has the strongest impact on behavior change, by limiting probation terms according to the table below.

Type of Offense	Recommended Maximum Probation Term
Felony Sex Offenses*	5 years
Other Felonies*	3 years, with one 12-month extension possible
Misdemeanors	2 years

*Excluding offenses ineligible for probation.

[50] Sims, B. & Jones, M. (2016). Predicting success or failure on probation: Factors associated with felony probation outcomes. Crime & Delinquency 43(3).; Olson, D.E. & Stalans, L.J. (2016). Violent Offenders on Probation. Violence Against Women 7(10).

[51] Lattimore, P. K., MacKenzie, D. L., Zajac, G. , Dawes, D., Arsenault, E. & Tueller, S. (2016). Outcome findings from the HOPE demonstration field experiment. Criminology & Public Policy, 15, 1103-1141.; Wodahl, E. J., Boman, J. H., & Garland, B. E. (2015). Responding to probation and parole violations: Are jail sanctions more effective than community-based graduated sanctions? Journal of Criminal Justice, 43, 242-250.

b. Eliminating the court's authority to revoke probation for non-violating behavior and to revoke probation for technical violations, unless the person on probation has already received three or more sanctions for technical violations.[52] Limits on the use of jail as a sanction for technical probation violations should be adopted according to the table below.

Sanction	Felony Probation	Misdemeanor Probation
1st sanction	Up to 15 days	Up to 5 days
2nd sanction	Up to 30 days	Up to 10 days
3rd sanction	Up to 45 days	Up to 15 days
4th and subsequent sanction	Up to remainder of sentence	Up to remainder of sentence

- A first or second sanction may be extended up to 45 days only if the person is awaiting placement in a treatment facility and does not have a safe alternative location to await treatment.
- A jail sanction or revocation should never be imposed solely for failing to seek and maintain employment; failing to pay required fines, fees, or treatment/programming costs; or failing to report a change in residence.
- A summons or order to show cause should be issued in lieu of a bench warrant for a technical probation violation, except if that violation is walking away from an inpatient treatment facility. If a probationer fails to appear on the summons or order to show cause, then a judge would retain discretion to issue a bench warrant.
- A probationer who is arrested for committing a technical violation and detained after arraignment must have a probation violation hearing held as soon as possible. If the hearing is not held before the jail sanction cap is reached, the probationer should be released from jail and returned to community supervision.

c. Standardizing and automating the process for earned early discharge for eligible probationers who are in compliance with the conditions of their probation.
    - A person should be eligible for earned early discharge from misdemeanor or felony probation after serving half of the original term of supervision, or at any time thereafter, if the person has completed required programming and has no violations in the previous three months. A person should not be deemed ineligible for earned early discharge due to inability to pay for conditions of probation or for outstanding debt in the form of fines, costs, or restitution, as long as good faith efforts to make payments have been made. Discharge from probation would not relieve the probationer from outstanding restitution obligations.
    - The probation officer should notify the judge and prosecutor 30 days before the probationer will become eligible for earned early discharge.
    - A hearing should be required only in felony cases involving an individual victim and in assaultive misdemeanor cases. In those cases, the prosecutor must give the victim notice and an opportunity to be heard. In all other cases, the hearing should be at the discretion of the judge.
    - The eligible person should be discharged from probation unless denied by the court with an appropriate justification on the record.

d. Mandating that any conditions of probation or parole be individualized and reasonably related to the assessed risks and needs of the person being supervised. Conditions ordered by the court or parole board, or otherwise imposed by a probation or parole agency, should not be unduly burdensome and should be adjusted when appropriate.

[52] For the purposes of this policy change, technical violation should be defined as any violation of the terms of a probation order that is not: 1) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether charged as a new offense or not; this does not include use of a controlled substance for which the only evidence is the result of a drug test, and it does not include criminal contempt of court; 2) A violation of an order of the court requiring that the probationer have no contact with a named individual (i.e., violation of a personal protective order); or 3) Absconding, defined as the intentional failure of an individual on supervision to report to the supervising agent and to advise the supervising agent of their whereabouts for a continuous period of at least 60 days. (Note: this chapter-specific definition necessarily will differ from the definition of absconding in the pretrial context.)

Financial barriers to compliance

Recommendation 16: Address financial barriers to compliance.

Inability to pay for criminal justice fines and fees can lead to incarceration and other negative outcomes. Michigan has some protections in place to prevent the incarceration of people solely because of inability to pay legal financial obligations, but there are several ways protections could be strengthened. For example, courts do not currently determine ability to pay at sentencing, but rather only upon failure to make required payments.

Michigan statute also authorizes sheriffs to charge people held in jail for each day of their incarceration through "The Prisoner Reimbursement to the County Act," including days spent in jail while unconvicted and presumed innocent. Though this amount is rarely collected, the debt itself can cause barriers to people's reentry to their communities and the workforce after a jail term.

The Task Force recommends:

a. Reducing fine amounts for civil infractions and requiring that individuals who are unable to afford a civil fine be offered an alternative such as community service.
b. Requiring courts to determine a person's ability to pay any fines and fees at the time of sentencing and at any hearing addressing the person's failure to pay. When payment of fines and fees would cause undue hardship to the person and their dependents, courts should waive or modify the financial obligation and consider an alternative non-monetary sanction, such as community service.
c. Encouraging courts utilizing payment plans to include debt forgiveness incentives to reward those who make consistent payments on legal financial obligations over a period of 12 months.
d. Repealing "The Prisoner Reimbursement to the County Act," which authorizes sheriffs to charge incarcerated individuals for each day of their incarceration. Or, alternatively, waiving fees upon determination of indigency, eliminate fees for the pretrial period of a person's incarceration, and reduce the maximum daily charge that is authorized under the Act.

Victim services

Recommendation 17: Invest in services and supports for crime victims.

The experiences and perspectives of crime survivors and victim-serving professionals are essential to shaping effective policy change. The Task Force heard extensive testimony about the safety needs and the dearth of resources for crime victims during and after the formal criminal justice process, and hosted two roundtable discussions with victims, survivors, and their advocates. To improve public safety, the state must prioritize the *individual* safety of crime victims and invest in supportive services, law enforcement training, and protection order service and enforcement.

The Task Force recommends:

a. Allocating significant funding to:
    - Help defray the costs of law enforcement serving personal protection orders when it is not safe for another person such as a friend or relative of the victim to serve it,
    - Expand training for law enforcement agencies in Forensic Experiential Trauma Interview (FETI) and other best practices for responding to calls related to domestic violence, and
    - Expand supportive services for crime victims and survivors separate from the criminal investigation and prosecution process, including counseling, shelter and transitional housing, and other survivor-centered services.
b. Requiring that conditions of personal protection orders be entered into the Law Enforcement Information Network (LEIN), so officers have more information when encountering a person who is the subject of an active order.

c. Directing a new or existing body to research and recommend policy changes that ensure the restitution process is transparent, efficient, and easy to navigate for victims and convicted people; and that restitution is further prioritized over the payment of other criminal justice fines and fees.

Data collection

Recommendation 18: Standardize criminal justice data collection and reporting.

Criminal justice data across the country, and in Michigan, often lack the level of detail and integration capabilities necessary to provide a comprehensive assessment of the system's performance and outcomes. This is especially true for criminal justice systems operating at the local-level, like courts and jails, which do not have uniform standards for capturing data and do not consistently report detailed information to a centralized body. To bring greater transparency to Michigan's criminal justice system and guide future decision-making and policy development, the state should improve the collection and reporting of criminal justice data across systems.

The Task Force recommends:

- Directing local and state criminal justice agencies to collect, record, and report data from arrest to disposition of a case, and through completion of any applicable sentence. The data collected should be accurate, comparable, and useful for monitoring the outcomes of statewide policy changes and should be made publicly available to the greatest extent possible while protecting the privacy of justice-involved individuals. To accomplish the necessary data improvements, a new or existing body should be directed to identify standards for collecting data and design a detailed plan for improving data collection and reporting.

Notes on recommendations

Task Force member Senator Runestad proposes that the following policies be given particular attention by the Legislature, regarding application to those with repeated criminal behavior: Recommendations 1(a), 2, 8(b), 9(a), 11(b), 15(a), and 16(a). The Senator also notes his objections to citations being issued in lieu of arrest for assaultive misdemeanors under Recommendation 3(a), to the threshold for non-financial conditions in Recommendation 9(a), and to Recommendation 14(c). Task Force member Representative Mueller notes his objections to automatic pre-arraignment release under Recommendation 8(b) and to parts of Recommendations 9 and 10. The Representative would also include a possible extension of the speedy trial timeline under Recommendation 12(a) for certain serious offenses.

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American Conservative Union
Americans for Prosperity
American Friends Service Committee
The Bail Project
Before During and After Incarceration
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Center for Employment Opportunities
Children's Advocacy Center of Kent County
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Michigan Fraternal Order of Police
Michigan Judicial Institute
Michigan Liberation
Michigan Mental Health Diversion Council
Michigan Professional Bail Agents Association
Michigan Protection & Advocacy Services
Michigan Public Health Institute
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Nation Outside
Northwest Initiative
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Pure Heart Foundation
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Data Sources and Methods

Criminal justice data across the country, and in Michigan, often lacks the level of detail and integration capabilities necessary to provide a comprehensive assessment of the system's performance and outcomes. This is especially true for courts and jails, which are most often operated at the local level, generally do not have uniform standards for capturing data, and report little or no data to a centralized body.

Despite these challenges, Michigan has made efforts to collect criminal justice information, and many sources of data exist that can provide important insights into how jails are being used and how their use has changed over time. This report relies on data from jails, courts, and law enforcement, captured at the national, state, and local levels. Most of these data sources were analyzed as stand-alone snapshots, but when possible, individuals were connected between datasets to capture a fuller picture of the criminal justice system as a whole.

Jail Data

Jails in Michigan

Like most other states, Michigan does not have a reliable source for centralized data on jail populations across the state,[53] so this report utilized jail data collected by the U.S. Department of Justice Bureau of Justice Statistics through the Census of Jails and Annual Survey of Jails when assessing the statewide jail population.

Beginning in 1970, the Census of Jails has asked each jail in the country for high-level information about its population every five to eight years; the most recent census was conducted in 2013. In non-census years, the Annual Survey of Jails asks a sample of jails across the country for similar information. The Bureau of Justice Statistics data was obtained via the Vera Institute of Justice's Incarceration Trends database and the National Archive of Criminal Justice Data at the Inter-university Consortium for Political and Social Research.[54] Information on the jail population before 1970 was obtained from the Bureau of Justice Statistics' *Historical Corrections Statistics in the United States, 1850 – 1984*.[55]

The jail population reported is the average daily population for that year. The data also distinguishes 'unconvicted' and 'convicted' detainees. The 'convicted' group includes probation or parole violators with no new sentence.

In years in which jails did not report data, or were not surveyed, data was interpolated based on the nearest reporting years. In three cases, extreme yearly population changes, likely reporting errors, were excluded and the nearest reporting years were used instead.

Sample of Jails in Michigan

To obtain information beyond that captured in the Census of Jails and Annual Survey of Jails, data was collected individually from a sample of jails across the state. The final sample included twenty jails and three years of jail data, amounting to just over 325,000 admissions. The twenty jails in the sample ranged in population size, were located in different regions across the state, and used different electronic software ('jail management systems') to track data. The data was reviewed with jail or IT staff to ensure accurate interpretation and Task Force staff focused on core components of the data that could be compared across facilities. The sample included Allegan, Alpena, Antrim, Branch, Genesee, Gratiot, Mason, Mecosta, Missaukee, Iosco, Iron, Jackson, Kent, Macomb, Muskegon, Oakland, Oceana, Ontonagon, Tuscola, and Washtenaw Counties.

[53] Over a decade ago the Michigan Department of Corrections led the development of a statewide database on jail information across the state through the Jail Population Information System. However, in recent year the data has not been relied upon for accurate representations across the state, in part due to inconsistent participation and unreliable definitions of data elements.
[54] Incarceration Trends data is accessible at https://github.com/vera-institute/incarceration_trends and the National Archive of Criminal Justice Data is accessible at https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/37135.
[55] The report is available at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1318.

Demographics

Basic demographic information was included in most of the data, specifically race and ethnicity, sex, and age (sometime calculated using date of birth). Certain categories of race and ethnicity were not analyzed because they were not captured across all facilities (e.g., Native American) or because staff were not confident they were being utilized appropriately at booking (e.g., Hispanic).

Age was available for 99 percent of admissions. Race and sex information was available for 91 percent of admissions, all but two counties. Those counties were therefore excluded when comparing race and sex in the jail data with the resident population of counties in the sample.

Offenses

Two types of coding systems were used by jails in the sample to identify charges associated with an admission to the jail: Michigan Incident Crime Reporting (MICR) codes, utilized by the Michigan State Police in tracking arrests and crime throughout the state, and Prosecuting Attorneys Coordinating Council (PACC) charge codes which correspond to Michigan Combined Law (MCL) statutes. Because these codes did not match up one-to-one, and because together they made up more than one thousand unique charges, the charges were grouped into broader offense categories for analysis. The following offense groups were used:

- *Assault* – Simple and aggravated assault, excluding any offenses referring domestic violence.
- *Breaking and Entering* – Burglary and breaking and entering offenses, with or without forced entry, in residences or non-residences.
- *Controlled Substance Violation, Delivery or Manufacture* – Delivering or manufacturing any controlled substance, possessing with intent to manufacture or deliver any controlled substance, or operating or maintaining a house or laboratory manufacturing any controlled substance.
- *Controlled Substance Violation, Possession or Use* – Possession or use of any amount of controlled substance (e.g., marijuana, cocaine, heroin).
- *Domestic Violence* – Assault or battery in which the victim has an intimate relationship, defined in MCL 750.81.[56]
- *Driving Without Valid License* – Operating a vehicle without a license, with a suspended or revoked license, or without a license on person.
- *Friend of the Court* – Failure to pay child support or disorderly person charges related to non-support.
- *Habitual* – Charges related to repeat offenses under the habitual offender statute without the specific underlying charge noted.
- *Miscellaneous Arrest* – Category utilized in MICR codes for criminal charges not otherwise specified within the available codes. No other charges were categorized as miscellaneous.
- *Motor Vehicle Violation, Driving* – Motor vehicle violations that directly relate to the driving behavior, such as reckless driving and failing to stop after a collision.
- *Motor Vehicle Violation, Paperwork* – Motor vehicle violations that are not driving-related (excluding Driving Without Valid License), such as operating a vehicle without insurance or valid license plates and permit violations.
- *Nuisance* – Trespassing, disorderly person, vagrancy, prostitution, and solicitation offenses.
- *Obstruction of Justice* – Offenses including contempt of court and failure to appear, but excluding Obstruction of Police, described below.
- *Obstruction of Police* – Resisting and obstructing, disarming, or fleeing from any law enforcement of public officer.

[56] Offenses were only categorized as domestic violence if specified by the PACC or MICR code. It's likely that some domestic violence cases were captured as assault cases at booking. While there are specific codes for aggravated assaults of family members (1301, 1302, 1303), there are not specific codes for simple assault of a family member or intimate partner.

- *Other Person Offense* – Person offenses not otherwise specified among the offense groups, including armed robbery, stalking, child abuse, and criminal sexual conduct.
- *Other Property Offense* – Property offenses not otherwise specified among the offense groups, including malicious destruction of property, falsely possessing credit cards, and embezzlement.
- *Other Public Order Offense* – Public order offenses not otherwise specified among the offense groups, including falsely reporting crimes and interfering with electronic communication.
- *Operating Under the Influence* – Operating a vehicle (motor vehicle, boat, etc.) while under the influence of alcohol or drugs, including any illegal amount of blood alcohol content, and including first-time or repeat offenses. Also includes transporting open container violations.
- *Probation/Parole Violation* – Violations and revocations of probation or parole supervision, when another specific offense was not listed.
- *Release Violation* – Violating conditions of pretrial release, including protective orders or electronic monitoring devices, and fugitive charges.
- *Sex Offender Technical Violation* – Failing to register or comply with conditions of sex offender convictions.
- *Theft* – Retail fraud, larceny, motor vehicle theft, and stolen property offenses of all monetary values; includes first-time and repeat offenses.
- *Weapons Offense* – Illegally carrying, possessing, selling, using, or tampering with a firearm or other weapon.

Offense information was available for 89 percent of admissions. If multiple charges were associated with a single admission, the most serious offense was identified using the information available in the jail data.

To determine the most serious offense, felonies were ranked first, followed by misdemeanors and then civil infractions. This ranking categorized the majority of admissions, but if charges were still tied for seriousness, Person Offenses were ranked first (Domestic Violence, Assault, Other Person Offense), followed by Controlled Substance Violations (Delivery or Manufacture, Possession or Use), Property Offenses (Breaking & Entering, Theft, Other Property Offense), Public Safety Offenses (Weapons, Operating Under the Influence, Driving Without a Valid License, Motor Vehicle Violations – Driving, Motor Vehicle Violations – Paperwork), Public Order Offenses (Obstruction of Police, Obstruction of Justice, Friend of the Court, Nuisance, Other Public Order Offenses), and Technical Offenses (Sex Offender Technical Violation, Probation/Parole Violation, Release Violation, Habitual Offense).

Crime class, indicating whether the offense was a misdemeanor, felony, or civil infraction, was available as a distinct data element. Because crime class was not always identifiable by the offense code (e.g., some Possession of Controlled Substance offense codes did not specify a substance amount), this analysis used the crime class element available in the data rather than inferring crime class from the MICR and PACC codes. Crime class was available for most admissions from all but six counties. In total, crime class was available for 74 percent of admissions in the sample.

Length of Stay

Length of stay was calculated as the difference between the date of admission and the date of release for a single booking into jail. Some individuals may have been admitted to jail multiple times for a single case, but length of stay as calculated captured the time of a single stay in jail. Individuals who were admitted and released to jail on the same day were considered to have stayed in jail "1 day or less." Individuals identified in the data as serving their jail sentence across multiple weekends were counted were counted as a single admission and excluded from the length of stay analysis. This group accounted for approximately one percent of all admissions in the sample. Admissions that did not have a release date were excluded from the length of stay analysis. This group accounted for less than one percent of all admissions.

Jail Bed Days

The size of the jail population is a function of the number of people admitted to jail and their length of stay. One individual who stays in jail two day takes up two bed days. Two individuals who each stay in jail 30 days take up 60 bed days total. Jail bed days were calculated by multiplying the number of people admitted to jail by the number of days they stayed. Individuals who were admitted and released on the same day were considered to take up 1 bed day in the analysis.

Release Reason

A reason for release was available for 92 percent of the admissions in the sample (primarily unavailable for

Muskegon and Ontonagon Counties). Because jails in Michigan do not have uniform standards for tracking data, the release reasons that were provided differed in level of specificity and had to be grouped into broader categories for analysis of the full sample.

The categories created included Bonded Out, Sentence Served, and Released to Other Agency. Releases that Bonded Out included those released on cash or surety bonds or those released on personal recognizance. Sentence Served included those released from jail because they had completed serving their sentence or had been sentenced to time served. Released to Other Agency included those released to another jail, to a federal agency, or to the Michigan Department of Corrections. If there were multiple reasons listed for release (e.g., sentenced served for one offense, bonded out on another charge) the release reason that most likely drove the length of time in jail was recorded, using the following hierarchy: Released to Other Agency, Sentenced Served, Bonded Out. For example, if an individual served a sentence for one offense and bonded out on another, the release reason was recorded as Sentence Served because that sentence most likely determined the length of time the individual was in jail.

Approximately 22 percent of admissions could not be categorized because the reason provided was unclear or it did not fall into one of the specified categories (e.g., overcrowding release, dropped charges). These more specific reasons were not consistently tracked across jails and could not be analyzed for the full sample.

Frequent Utilizers

Inmate identification numbers were used to identify the number of times an individual was admitted to the jail during the sample period. This count only includes repeat admissions into the same facility, it does not capture cases where an individual may have been admitted to a different jail. Individuals serving their sentence over multiple weekends were only counted as a single admission.

Linking to Court Data

Most of the jail data did not have complete information from the court about the status of criminal charges. As a result, it was not possible to tell what portion of jail time was spent pretrial versus sentenced for people who were released after serving a sentence. To help identify that distinction, the jail data was linked to court data using the personally identifiable information available in both data sets. Cases were considered a match if they had the same first and last name and date of birth, were sentenced within the same county that they were jails and the sentence date lined up with their jail stay. In all, about 35,000 admissions that were released from jail after completing their sentence were linked to the court data.

Urbanicity

Counties were classified using categorizations created by the Vera Institute of Justice for research on jail populations across the United States.[57] The classification categories were modified from the National Center for Health Statistics' *Urban-Rural Classification Scheme* and are based on U.S. Census Bureau population data.[58]

- *Urban* – One of the core counties of a metropolitan area with one million or more people: Kent, Wayne (2)
- *Suburban* – Counties within the surrounding Urban area: Barry, Lapeer, Livingston, Macomb, Montcalm, Oakland, Ottawa, St. Clair (8)
- *Small/mid* – Counties with medium and small metro areas: Bay, Berrien, Calhoun, Cass, Clinton, Eaton, Genesee, Ingham, Jackson, Kalamazoo, Midland, Monroe, Muskegon, Saginaw, Van Buren, Washtenaw (16)
- *Rural* – Counties of less than 50,000 (micropolitan) and non-core areas: Alcona, Alger, Allegan, Alpena, Antrim, Arenac, Baraga, Benzie, Branch, Charlevoix, Cheboygan, Chippewa, Clare, Crawford, Delta, Dickinson, Emmet, Gladwin, Gogebic, Grand Traverse, Gratiot, Hillsdale, Houghton, Huron, Ionia, Iosco, Iron, Isabella, Kalkaska, Keweenaw, Lake, Leelanau, Lenawee, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Missaukee, Montmorency, Newaygo, Oceana, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Sanilac, Schoolcraft, Shiawassee, St. Joseph, Tuscola, Wexford (57)

Mental Health

The Wayne State University Center for Behavior Health and Justice (the Center) has studied the prevalence of mental illness and substance misuse in Michigan's jail population. On behalf of the Michigan Mental Health

[57] See Vera Institute of Justice, *Out of Sight: The Growth of Jails in Rural America* (2017).
[58] See U.S. Department of Health and Human Services, Vital Health Statistics 2, no.166. *2013 NCHS Urban–Rural Classification Scheme for Counties* (2014).

Diversion Council, the Center piloted systematic screenings for Serious Mental Illness (SMI) in ten jails across the state using the Kessler 6 (K6) between 2015 and 2019. In 2019, almost 4,000 admissions to jail were screened using the K6 and analyzed to determine the prevalence of SMI in Michigan's jails (a cut-off score of 9 was used to define SMI). Overall, 23 percent of people admitted met the threshold for SMI, but the share varied depending on the population size of the county – jails in metropolitan counties had a prevalence of 21 percent, urban counties 19 percent, and rural counties 34 percent. Analysis of over 1,000 screened admissions in 2017 found that individuals that met the threshold for SMI spent 14 more days in jail than those who did not meet the SMI threshold, even when controlling for offense type. The prevalence of serious mental illness for Michigan's general population was assessed by the Substance Abuse and Mental Health Services Administration and reported in *Behavioral Health Barometer, Michigan, Volume 5.* The prevalence is the annual average during 2013-2017 for adults 18 and older.[59]

Arrest Data

The Michigan State Police compiles statewide data on arrests from approximately 600 police and sheriffs' departments. Since 2008, the state has used incident-based crime reporting, which tracks a greater number of individual offenses and information than the FBI's Uniform Crime Reporting (UCR) Program.

The arrest data track "arrest events" which include people arrested on warrants (Warrant Arrests), people arrested when law enforcement observe a violation of the law (On-View Arrests), and people who are issued a citation or a summons to court in lieu of an arrest (Citations). Like the UCR Program, the data captures one arrest event for each separate instance a person is arrested, cited, or summoned. An arrest event could involve multiple criminal charges for the person being taken into custody. Like the UCR Program, if there are multiple offenses associated with an arrest, Michigan's data captures the most serious charge.

A citation, also called an appearance ticket, involves directing a person to appear in court on a specific date. In Michigan, officers can use citations instead of making an arrest only for misdemeanors that are punishable by 93 days or less, with some exclusions. This data does not include most traffic violations, such as driving with a suspended license, which are citable offenses in Michigan. The Task Force heard from law enforcement that traffic violations are frequently cited, so if they were included in the data the share of citations issued would be higher.

Between 2008 and 2018, new charges were added to the list of arrest codes specifying additional types of Operating Under the Influence. These new charges were collapsed into a broader group to ensure consistent comparison across years. As referred to in this report, Operating Under the Influence includes Driving with BAC > 0.08 and "Super Drunk Driving" (BAC > 0.17).

Court Data

Judicial Data Warehouse

The Michigan Supreme Court, through the State Court Administrative Office (SCAO), established the statewide Michigan Judicial Data Warehouse (JDW). The JDW is the state's central electronic repository for court records in civil and criminal cases, with nearly all courts across the state reporting to the database. In 2018, the JDW contained 97 percent of criminal cases reported by local courts.

The JDW was used to analyze misdemeanor sentence length, disposition, and days credited to an individual's sentence, or "jail credit." According to statute, a judge will credit to an individual's sentence any days served in jail prior to sentencing. In the analysis of jail credit, cases were considered "Sentenced to Time Served" if the days of jail credit were equal to the number of days sentenced to jail. Sentence information for cases filed in 2018 was available for 90 percent of expected cases (i.e. cases disposed as guilty).

The JDW holds charges identified through Prosecuting Attorneys Coordinating Council (PACC) codes, Secretary of State (SOS) codes, and local ordinances. These codes and associated descriptions amounted to thousands of unique charges, 88 percent of which were identified for analysis.

Traffic violations were identified as all criminal offenses falling under the Motor Vehicle Code (Chapter 257 of the Michigan Compiled Laws) and driving violations under the Insurance Code (specifically, MCL 500.3101). This category included offenses such as Driving with a Suspended License and Driving Without Insurance; it did not include Operating Under the Influence offenses. To

[59] Substance Abuse and Mental Health Services Administration, *Behavioral Health Barometer, Michigan, Volume 5* (2019). Available at https://store.samhsa.gov/product/Behavioral-Health-Barometer-Volume-5/sma19-Baro-17-US.

identify traffic violations when there were multiple charges associated with a case (occurring in approximately 20 percent of cases) the most serious offense was identified before conducting analyses. The most serious offense was determined by first ranking felony charges before misdemeanors, and then ranking by seriousness of the charge, according to the hierarchy Person Offenses, Controlled Substance Offenses, Property Offenses, Weapons Offenses, Operating Under the Influence, and Traffic Violations.

OMNI Data (Felony sentencing data)

The Michigan Department of Corrections (MDOC) compiles data on felony case dispositions and sentences across the state in the Offender Management Network Information system (OMNI). This includes the results of presentence investigations, conducted for every felony conviction by MDOC staff to aid judges at sentencing.

Analyses were conducted at the level of sentencing events, or all offenses that an individual was sentenced for on a single day. When sentencing events included multiple offenses or dispositions, the most serious disposition was used. The most serious disposition was determined using the sequencing outlined in MDOC's 2018 Statistical Report: Prison, Jail and Probation, Jail, Probation, Other. If the disposition types were the same, the disposition with the longest minimum term was reported, and if the dispositions were still equal, then the disposition with the longest maximum term was reported.

The available data accounted for 89 percent of all felony convictions in the state, and excluded convictions statutorily sealed from public records (e.g., HYTA sentences). Felony sentencing data was used to analyze sentence length and jail credit but was not used to report the number of felonies sentenced to jail. Total felonies sentenced to jail was reported in MDOC's 2018 Statistical Report and included all felony convictions.[60]

County Budget Data

Counties in Michigan report budget information to the state using the F-65 form, Annual Financial Report. The Michigan Department of Treasury makes some county budget data available through the Michigan Community Financial Dashboard, and this publicly available data was analyzed.[61] Counties report expenses by fund, subcategory, and general expense description, but the reported information may not include the level of detail counties use on their individual charts of accounts.

Resident Population Data

The U.S. Census Bureau releases annual resident population estimates at the state and county level by race, ethnicity, age, and sex. The population estimates are for July 1st of each year and are based on the Census 2000 and Census 2010 counts. In collaboration with the National Center for Health Statistics, an online database of population estimates is publicly available and was used in this report.[62]

Crime Data

The Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program tracks reported property and violent crimes from law enforcement agencies across the country and is made publicly available.[63]

The crime rate is calculated as the number of crimes per 100,000 residents. In the UCR data, violent crime includes murder, nonnegligent manslaughter, rape, robbery, and aggravated assault, and property crime includes burglary, larceny-theft, motor vehicle theft, and arson. Non-violent and non-property crimes (such as controlled substance offenses) are not reported.

[60] Michigan Department of Corrections, *2018 Statistical Report* (2019) https://www.michigan.gov/corrections/0,4551,7-119-1441---,00.html.
[61] The data is accessible at https://micommunityfinancials.michigan.gov/#!/dashboard/COUNTY/?lat=44.731431779455505&lng=-83.018211069625&zoom=5.
[62] The data is accessible at https://wonder.cdc.gov/.
[63] The data is accessible at https://ucr.fbi.gov/crime-in-the-u.s.

Research References

The below studies were cited in the section of this report titled *Is jail an effective intervention?*

[i] Holsinger, A. (2016). *Analyzing bond supervision survey data: The effects of pretrial detention on self-reported outcomes*. Boston, MA: Crime and Justice Institute. Note: Author notes there may be differences between the two groups evaluated that were not controlled for. In addition, results may not necessarily be generalizable to those released without supervision or held pretrial.

[ii] Apel, R., & Sweeten, G. (2010). The impact of incarceration on employment during the transition to adulthood. *Social Problems, 57(*3), 448-479.; Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *American Economic Review, 108*(2), 201-240.

[iii] Henrichson, C., Roberts, S., Mai, C., Delany-Brumsey, A., Laisne, M., Davis, C., & Wilson, R. (2017). *The costs and consequences of bail, fines and fees in New Orleans*. New York: Vera Institute of Justice.

[iv] Leslie, E. & Pope, N.G. (2017). The unintended impact of pretrial detention on case outcomes: Evidence from New York City arraignments. *The Journal of Law and Economics, 60*(3), 529-557.

[v] Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *American Economic Review, 108*(2), 201-240.; Stevenson, M. (2018). Distortion of justice: How the inability to pay bail affects case outcomes. *The Journal of Law, Economics, and Organization, 34*(4), 511-542.

[vi] Leslie, E. & Pope, N.G. (2017), *supra* n. iv.

[vii] Didwania, S. H. (2018). *The immediate consequences of pretrial detention: Evidence from federal criminal cases*. Retrieved from https://ssrn.com/abstract=2809818.orhttp://dx.doi.org/10.2139/ssrn.2809818; Oleson, J.C., Lowenkamp, C.T., Cadigan, T.P., VanNostrand, M., & Wooldredge, J. (2014). The effect of pretrial detention on sentencing in two federal districts. *Justice Quarterly, 33*(6), 1103-1122.; Oleson, J. C., Lowenkamp, C. T., Wooldredge, J., VanNostrand, M., & Cadigan, T. P. (2017). The sentencing consequences of federal pretrial supervision. *Crime & Delinquency, 63*(3), 313-333.; Heaton, P., Mayson, S., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review, 69*, 711.; Phillips, M. T. (2012). *A decade of bail research in New York City*. New York: New York Criminal Justice Agency, Inc.

[viii] Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. M. (2013). *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*. Laura and John Arnold Foundation.

[ix] Addiction Policy Forum. (2017*). Spotlight: Montgomery County STEER (Stop, Triage, Engage, Educate and Rehabilitate)*.; Clifasefi, S. L., Lonczak, H. S., & Collins, S. E. (2017). Seattle's Law Enforcement Assisted Diversion (LEAD) program: Within-subjects changes on housing, employment, and income/benefits outcomes and associations with recidivism. *Crime & Delinquency, 63*, 429-445.; Collins, S. E., Lonczak, H. S., & Clifasefi, S. L. (2017). Seattle's Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism outcomes. *Evaluation and Program Planning, 64*, 49-56.

[x] International Association of Chiefs of Police. (2016). *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States*. Alexandria, VA: International Association of Chiefs of Police.

[xi] Phillips, M. T. (2012), *supra* n. vii.

[xii] Ouss, A., & Stevenson, M. (2019). Evaluating the impacts of eliminating prosecutorial requests for cash bail. *George Mason Legal Studies Research Paper No. LS, 19-08.*

[xiii] Jones, M. R. (2013). *Unsecured bonds: The as effective and most efficient pretrial release option*. Rockville, MD: Pretrial Justice Institute.; Brooker, C. M. B., Jones, M. R., & Schnacke, T. R. (2014*). The Jefferson County Bail Project: Impact study found better cost effectiveness for unsecured recognizance bonds over cash and surety bonds*. Rockville, MD: Pretrial Justice Institute.

[xiv] Block, M. K. (2005). The effectiveness and cost of secured and unsecured pretrial release in California's large urban counties: 1990-2000. University of Arizona.; Helland, E., & Tabarrok, A. (2004). The fugitive: Evidence on public versus private law enforcement from bail jumping. *The Journal of Law and Economics, 47*(1), 93-122.

[xv] Bureau of Justice Statistics. (2010). *Data Advisory: State court processing statistics data limitations.* Washington, D.C.: U.S. Department of Justice.

[xvi] Gupta, A., Hansman, C., & Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. *The Journal of Legal Studies, 45*(2), 471-505.

[xvii] Bales, W., & Piquero, A. (2012). Assessing the impact of imprisonment on recidivism*. Journal of Experimental Criminology, 8*, 71-101. Note: Measured recidivism only as a felony reconviction. Prison was compared to community control, making prison less effective compared to community control.; Cochran, J., Mears, D., & Bales, W. (2014). Assessing the effectiveness of correctional sanctions*. Journal of Quantitative Criminology, 30*, 317-347. Note: Measured recidivism only as a felony reconviction. Categories were compared to probation, making jail and prison less effective compared to probation.

[xviii] Cochran et al. (2014).; Caudy, M., Tillyer, M.S., & Tillyer, R. (2018). Jail versus probation: A gender specific test of differential effectiveness and moderators of sanction effects*. Criminal Justice and Behavior, 45*(7), 949-968.

[xix] Killias, M., Aebi, M., & Ribeaud, D. (2000). Does community service rehabilitate better than short-term imprisonment? Results of a controlled experiment*. The Howard Journal of Crime and Justice, 39*, 40-57.; Killias, M., Gillieron, G., Villard, F., & Poglia, C. (2010). How damaging is imprisonment in the long-term? A controlled experiment comparing long-term effects of community service and short custodial sentences on re-offending and social integration? *Journal of Experimental Criminology, 6,* 115-130.; Diggs, D., & Pieper, S. (1994). Using day reporting centers as an alternative to jail*. Federal Probation, 58*(1), 9-12.; Harris, A., Huebner, B., Martin, K., Pattillo, M., Pettit, B., Shannon, S., Sykes, S., & Uggen, C. (2017). *United States systems of justice, poverty, and the consequences of non-payment of monetary sanctions: Interviews from California, Georgia, Illinois, Minnesota, Missouri, Texas, New York, and Washington.* Laura and John Arnold Foundation.; Zedlewski, E.W. (2010). *Alternatives to custodial supervision: The day fine.* Discussion Paper. Washington, D.C.: National Institute of Justice.

[xx] Wodahl, E. J., Boman, J. H., Garland, B. E. (2015). Responding to probation and parole violations: Are jail sanctions more effective than community-based graduated sanctions? Journal of Criminal Justice, 43, 242-250.

[xxi] Boman IV, J. H., Mowen, T. J., Wodahl, E. J., Lee Miller, B., & Miller, J. M. (2019). Responding to substance-use-related probation and parole violations: are enhanced treatment sanctions preferable to jail sanctions? Criminal Justice Studies, 32(4), 356-370.

[xxii] Washington State Institute for Public Policy. (2012). *Confinement for Technical Violations of Community Supervision: Is there an effect on felony recidivism?* Olympia, WA: Washington State Institute for Public Policy.

ATTACHMENT 6

Post-Release Recidivism and Employment among Different Types of Released Offenders: A 5-Year follow-up Study in the United States

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Abstract

The main focus of this 5-year (2005-2009) follow-up study of released offenders was to explore the post-release employment and recidivism among different types of released offenders before, during, and after the economic recession of 2008. The dataset of this study contained a cohort of 6,561 offenders who were released from the Indiana Department of Correction (IDOC), United States, throughout 2005. Results of this study revealed 37.0 percent of violent offenders, 38.2 percent of non-violent offenders, 36.3 percent of sex offenders, and 36.9 percent of drug offenders were never employed since release from prison. The recidivism rate was 46.6 percent among violent offenders, 48.6 percent among non-violent offenders, 54.7 percent among sex offenders, and 45.8 percent among drug offenders, respectively. Most importantly, the results of this study revealed that an offender's education and post-release employment were significantly and statistically correlated with recidivism, regardless of the offender's classification. This study also found a relatively high unemployment rate among released offenders within the first year of release from prison. Accordingly, almost half of the recidivist offenders were re-incarcerated within 12 months of the initial release.

Keywords: Released Offenders, Recidivism, Violent offenders, Non-Violent offenders.

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Introduction

Rarely have researchers examined the patterns of post-release employment and recidivism among ex-offenders before, during, and after the economic recession. A major obstacle was that previous researchers were unable to obtain offenders' post-release employment information. Instead, they relied on the unemployment information of the general population to examine the impact of employment/unemployment on recidivism among ex-offenders. Ex-offenders were usually characterized as economically poor, educationally illiterate, socially inadequate to societal norms, and disproportionally unemployed after release from prison. For example, researchers (Fehr, 2009; Matsuyama & Prell, 2010) found that ex-offenders frequently encountered numerous challenges after release from prison because of deficiencies in education and job skills. Accordingly, uneducated/unskilled offenders were likely to be unemployed after release from prison; and, in turn, they were likely to become recidivist offenders simply because they were unable to be financially sufficient for independent living in the community.

According to the most recent prison release data from the Bureau of Justice Statistics (Guerino, et al., 2012), the United States' imprisonment rate in 2010 was 500 sentenced prisoners per 100,000 (or 1 in 200 residents) and there were 708,677 prisoners released from state and federal correctional institutions during 2010. Results from previous studies identified a variety of factors, such as, educational illiteracy, lack of job skills, lack of interpersonal skills, criminal history, the neighborhood contexts, or employment, that might contribute to a relatively high recidivism rate among ex-offenders (Gendreau et al., 1996; Hemphill et al., 1998; Klimecki et al., 1994; Kubrin & Stewart, 2006; Rossman & Roman, 2003; Uggen, 2000; Vacca, 2004; Visher et al., 2005). Undoubtedly, previous recidivism studies highlighted several profound challenges for incarcerated individuals to successfully reenter the community upon release from prison. Particularly, prisoners who were released during the recessionary period encountered much greater challenges due to job scarcity in labor markets and weak economic conditions. Researchers (Bushway, 2011; Cox, 2010; Fletcher, 1999; Hannon & DeFina, 2010; Mears & Mestre, 2012; Nally, et al., 2012) indicated that unemployment and recidivism were interrelated during the recession; however, there was a need to conduct a longitudinal study of the patterns of post-release employment and recidivism among ex-offenders during the recessionary period. Accordingly, the present researchers conducted a 5-year follow-up study of post-release employment and recidivism among 6,561 released offenders and examined the interrelationship of recidivism and employment among different types of offenders (i.e., violent, non-violent, sex, and drug offenders) before, during, and after the recent economic recession of 2008.

Challenges to Reducing Recidivism among Ex-Offenders

Undoubtedly, ex-offenders had to overcome a variety of challenges in order to successfully reenter the community upon release from prison. Realistically, finding employment was one of the immediate challenges to an ex-offender upon release from prison, and it was increasingly difficult during the recessionary period. Ex-offenders were frequently kept from employment due to criminal background checks (Holzer, et al., 2004; Pettit & Lyons, 2007; Travis, 2005) or deficiencies in education and job skills (Fashey, et al., 2006; Hollin & Palmer, 2009; Rossman & Roman, 2003; Vacca, 2004). During the economic recessionary period, it was extremely difficult for ex-offenders to compete with law-abiding citizens for limited job opportunities in all industrial sectors.

Additionally, employers were generally reluctant to hire ex-offenders due to issues of liabilities or concerns about their customers' discomfort (Albright & Denq, 1996; Backman, 2011; Clear, et al., 2001; Giguere & Dundes, 2002; Gunnison & Helfgott, 2010; Harris & Keller, 2005; Holzer, et al., 2006; Lukies, et al., 2011; Stoll & Bushway, 2008; Varghese, et al., 2010). Particularly, employers would likely access the sex offender registry to keep from hiring a sex offender in order to maintain a safe workplace and to protect customers where children were congregated.

Previous researchers (Finn, 1998; Harrison & Schehr, 2004; Solomom, et al., 2008; Visher, et al., 2008; Uggen, 2000; Uggen & Staff, 2001; Wadsworth, 2006) indicated that post-release employment could serve as an important mechanism to prevent ex-offenders from involvement in criminal activities when reentering the community. Theoretical assumptions on the causal relationship between employment and recidivism were primarily based on the concept that ex-offenders would likely re-offend if they could not obtain legitimate and sustainable employment upon release from prison. A consistent finding was that released offenders were likely to become recidivist offenders after release from prison if they were unemployed (Allen, 1988; Batiuk, 1997; Blomberg, et al., 2012; Burke & Vivian, 2001; Fabelo 2002; Harlow, 2003; Nuttall, et al., 2003; Vacca, 2004; Wilson, et al., 2000).

Another significant challenge to an offender's reentry into the community was his level of formal education. Particularly, those educationally-illiterate ex-offenders were disproportionally unemployed due to their inadequate education and job skills (Aos, et al., 2006; Batiuk, 1997; Chappell, 2002; Erisman & Contardo, 2005; Harlow, 2003; Steurer & Smith, 2003; Vacca, 2004; Winterfield, et al., 2009). A recent study (Nally, et al., 2012) revealed that ex-offenders who had a lower level of education had a higher recidivism rate and a higher unemployment rate. Meanwhile, uneducated (or under-educated) ex-offenders were likely to be re-incarcerated earlier than those offenders who had a higher level of education. Realistically, correctional education programs were educational remedies for a vast majority of offenders to improve their education and job skills during incarceration. Steurer, et al. (2001) conducted a 3-year follow-up study of the impact of correctional education on recidivism and employment among ex-offenders and results showed that correctional education program participants had a lower recidivism rate than those offenders who did not participate in correctional education programs. However, Steurer et al. (2001) found that the effect of correctional education on post-release employment was statistically insignificant because post-release employment among ex-offenders was largely dependent upon economic conditions during the time period of release, regardless of the offender's level of formal education.

Economic conditions (e.g., recession) greatly impacted post-release employment and recidivism among ex-offenders (Bellair & Kowalski, 2011; Bushway, 2011; Cox, 2010; Hannon & DeFina, 2010; Harrison & Schehr, 2004; Wang, et al., 2010). Previous researchers used the unemployment rate of the general population, rather than the population of ex-offenders, as a predictor to estimate post-release recidivism among released offenders. Nonetheless, the unemployment rate in the general population is significantly different from the population of ex-offenders in any given economic condition. For example, the unemployment rate in the general population was about 9.9 percent at the end of December of 2009 (U.S. Department of Labor, 2012). Surprisingly, Nally, et al. (2011) found the unemployment rate among ex-offenders was 65.6 percent during the recent recessionary period of 2008-2009. Across states, ex-offenders

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encountered incremental challenges in finding a job during the recent recessionary period and a higher recidivism rate was expected as the unemployment rate increased (see, for examples, Bellair & Kowalski, 2011; Uggen, 2000). Due to limited access to employment-related information among released offenders, previous researchers likely would have insufficient information about an offender's employment status after his release from prison. Consequently, the effect of post-release employment on recidivism among ex-offenders might not be accurately estimated.

Post-release recidivism is regarded as the primary measure of the success of an offender's reentry into the community. Previous studies revealed that post-release recidivism rates were quite different among different types of ex-offenders. For example, Roman, et al. (2003) found the recidivism rate among drug offenders was 16.4 percent within 1 year, but increased to 27.5 percent within 2 years after graduation from drug court supervision. Langan, et al. (2003) revealed the recidivism rate was 43.0 percent among 9,691 sex offenders within 3 years after release from prison. Durose and Mumola (2004), who examined the recidivism rates among 210,886 non-violent offenders (committing property, drug, public-order or other non-violent offenses), found almost 7 in 10 non-violent offenders were re-arrested within 3 years after release from prison, nearly 50 percent of nonviolent offenders were re-convicted, and more than 25 percent of non-violent offenders were re-incarcerated. Undoubtedly, there is a need to further examine the potential distinctive differences of post-release employment and recidivism among different types of ex-offenders.

In an attempt to understand the contributing factors to recidivism, the present researchers conducted a 5-year follow-up study of 6,561 offenders who were released throughout 2005 from the Indiana Department of Correction (IDOC). As part of this, individual offender's employment information was obtained from the Indiana Department of Workforce Development (IDWD) to adequately examine the effect of employment on recidivism. In this study, possible similarities or differences among different types of offenders (i.e., violent offenders, non-violent offenders, sex offenders, and drug offenders), in terms of post-release employment and recidivism, were carefully examined. Furthermore, the present researchers analyzed the impact of the economic recession of 2008 on post-release employment and recidivism among ex-offenders.

Methodology

Data Description

To examine the patterns and interrelationships of post-release employment and recidivism among ex-offenders during the recessionary period, the present researchers conducted a 5-year (2005-2009) follow-up study of 6,561 offenders who were released from Indiana Department of Correction (IDOC) throughout 2005. Specifically, there were 1,755 offenders released in the first quarter of 2005, 1,633 offenders in the second quarter of 2005, 1,659 offenders in the third quarter of 2005, and 1,514 offenders in the fourth quarter of 2005. This cohort of 6,561 released offenders represented more than 43 percent of a total of 15,184 offenders released from IDOC custody in 2005. It is important to note that the economic recession started in December of 2007 and ended in late 2008, but the unemployment rate in 2009 was significantly higher than that in the recession period (U.S. Department of Labor, 2012). The prominent feature of this 5-year follow-up study included detailed information about individual offender's employment during three different time periods (pre-recession, during-recession, and post-recession), which

allowed the present researchers to analyze the potential impact of the recent recession of 2008 (i.e., employment/unemployment) on post-release recidivism among ex-offenders in the State of Indiana.

The dataset in this 5-year follow-up study was collected from three (3) primary sources: (1) the IDOC Division of Research and Planning, (2) the IDOC Education Division, and (3) the Indiana Department of Workforce Development (IDWD). IDOC Division of Research and Planning provided up-to-date information such as the offenders' demographical characteristics or legal information (e.g., recidivism). IDOC Education Division provided information regarding the incarcerated offenders' educational information such as the level of education prior to release from IDOC custody. Based upon information from "employed" offender's W-9 forms, Indiana Department of Workforce Development (IDWD) provided offender's post-release employment information (e.g., job title or income), if employed. IDWD documented offender's employment information quarterly, but there was no employment information among unemployed offenders if they had never been employed since release in a quarter in any given year during the study period. Undoubtedly, IDWD provided the present researchers with crucial employment-related information which was used to analyze the patterns of post-release employment among ex-offenders during the recessionary period and the potential effect of employment on recidivism among this cohort of 6,561 ex-offenders in Indiana.

Outcome Measures and Variables

The major outcome measure in this study focused on post-release recidivism among a cohort of 6,561 released offenders during the study period of 2005-2009. Undoubtedly, measuring recidivism can be difficult because it is defined so differently among a variety of criminal justice agencies (Blumstein & Larson, 1971; Boudouris, 1984; Hoffman &Stone-Meierhoefer, 1980; Latessa & Holsinger, 1998; Maxfield, 2005; Maxwell, 2005; Mears et al., 2008; Vrieze & Grove, 2010). Although five major indicators have been identified as measures of recidivism, including (1) police arrest, (2) a criminal charge for a new offense, (3) a reconviction for a new criminal offense, (4) re-incarceration, and (5) a court-mandated supervision revocation (e.g., a probation or parole violation), the post-release recidivism in the present study was measured by re-incarceration in IDOC.

Through reviewing IDOC files on the offender's release date and return date, the present researchers were able to determine the recidivism status, the survival time (elapsed time between release and return), and legal reasons for re-incarceration. An offender was considered as a recidivist offender in the study period of 2005-2009, if he or she returned to IDOC custody after the initial release in 2005. Previous studies of recidivism usually focused on the prevalence rate among ex-offenders, but with little or no information about the time frame when recidivist offenders returned to prison. By calculating the elapsed time between re-incarceration and the initial release in 2005, the present researchers examined the patterns of re-incarceration and post-release recidivism rates among recidivist offenders in the study period of 2005-2009. In addition, legal reasons for re-incarceration among those recidivist offenders were analyzed.

In order to explore potential distinctions of offender's characteristics relative to post-release recidivism, independent measures in this study included ethnicity, gender, age, and level of formal education (prior to release from IDOC custody). Undoubtedly, an offender's ethnicity was frequently used as an indicative variable or predictor to examine

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racial disparities in post-release recidivism (Bales & Piquero, 2012; Wang, et al., 2010; Wehrman, 2010). Additionally, post-release employment among ex-offenders was another important independent measure to recidivism in this study. Researchers (Needels, 1996; Tripodi, et al., 2010; Uggen, 2000; Visher, et al, 2008) consistently indicated that post-release employment was an important predictor of recidivism. However, there was a need to conduct a longitudinal study to further examine the relationship between post-release employment and recidivism among ex-offenders.

In this study, offender classification was treated as a control variable to examine the patterns of post-release employment and recidivism among different types of offenders. Offender classification was based on the most serious offense that an offender had committed. In other words, an offender who committed a "crime against a person" was categorized as a "violent" offender; an offender who committed a "crime against property or misdemeanor" was categorized as a "non-violent" offender; an offender who committed a "sex-related crime" was categorized as a "sex" offender; and a offender who committed a "drug-related crime" was categorized as a "drug" offender. Consequently, the present researchers grouped this cohort of 6,561 ex-offenders into four (4) different subgroups; they were: (1) violent offenders (n=1,201), (2) non-violent offenders (n=3,469), (3) sex offenders (n=369), and (4) drug offenders (n=1,522).

Data Analysis

Data analyses in this study primarily focused on examining the offender's characteristics (i.e., ethnicity, gender, age, and education) relative to post-release employment and recidivism among different types of ex-offenders (i.e., violent, non-violent, sex, and drug offenders). The effects of the offender's characteristics on the recidivism rate among different types of offenders would be the primary outcome measures in this study. In other words, offender's characteristics (i.e., ethnicity, gender, age, and education) and post-release employment were treated as important predictors of recidivism among different types of ex-offenders. Due to the dichotomous nature of dependent measurement (recidivist offenders versus non-recidivist offenders), a logistic multiple regression analysis was used to examine the effect of the offenders' characteristics and post-release employment on recidivism among the cohort of 6,561 ex-offenders, while controlling for the offender classifications (i.e., violent, non-violent, sex, and drug offenders). Such multiple regression analyses would provide a clear indication of which factor exerted the most influential impact on post-release recidivism among ex-offenders.

Results

As Table 1 illustrates, 18.3 percent (n=1,201) of a total of 6,561 offenders who were released from IDOC custody in 2005 were classified as "violent" offenders, 52.9 percent (n=3,469) were "non-violent" offenders, 5.6 percent (n=369) were "sex" offenders, and 23.2 percent (n=1,522) were "drug" offenders. Results of this study revealed a majority of 1,201 violent offenders were African American males in the age range of 20-40 years old. A majority of 1,201 violent offenders had a high school diploma or GED (n=627), but 35.3 percent (n=424) of violent offenders had an education below high school. 37.0 percent (n=444) of 1,201 violent offenders had never been employed after release from prison. The post-release recidivism rate was 46.6 percent among 1,201 violent offenders in the study period of 2005-2009.

Table 1: Descriptive Statistics of Offender Characteristics (N=6,561)

Variable	Violent Offenders (n=1201)	Non-Violent Offenders (n=3469)	Sex Offenders (n=369)	Drug Offenders (n=1522)
Offender Race				
African American	709 (59.0%)	1871 (53.9%)	154 (41.7%)	1129 (74.2%)
Caucasian	454 (37.8%)	1513 (43.6%	203 (55.0%)	361 (23.7%)
Hispanic	33 (2.7%)	69 (2.0%)	10 (2.7%)	24 (1.6%)
Asian	4 (0.3%)	11 (0.3%)	2 (0.5%)	4 (0.3%)
Unknown	1 (0.1%)	5 (0.1%)	0 (0.0%)	4 (0.3%)
Offender Gender				
Female	79 (6.6%)	514 (14.8%)	69 (18.7%)	218 (14.3%)
Male	1122 (93.4%)	2955 (85.2%)	300 (81.3%)	1304 (85.7%)
Offender Age				
Under 20 years old	40 (3.3%)	63 (1.8%)	1 (0.3%)	20 (1.3%)
20-29 years old	409 (34.1%)	1176 (33.9%)	120 (32.5%)	666 (43.8%)
30-39 years old	361 (30.1%)	1100 (31.7%)	102 (27.6%)	431 (28.3%)
40-49 years old	297 (24.7%)	889 (25.6%)	105 (28.5%)	295 (19.4%)
50-59 years old	82 (6.8%)	203 (5.9%)	31 (8.4%)	98 (6.4%)
60 years old or above	12 (1.0%)	38 (1.1%)	10 (2.7%)	12 (0.8%)
Offender Education				
Below high school	424 (35.3%)	1161 (33.5%)	154 (41.7%)	582 (38.2%)
High school or GED	627 (52.2%)	1856 (53.5%)	184 (49.9%)	794 (52.2%)
College	91 (7.6%)	146 (4.2%)	23 (6.2%)	46 (3.0%)
Unknown	59 (4.9%)	306 (8.8%)	8 (2.2%)	100 (6.6%)
Employment Status				
Unemployed	444 (37.0%)	1326 (38.2%)	134 (36.3%)	561 (36.9%)
Employed	757 (63.0%)	2143 (61.8%)	235 (63.7%)	961 (63.1%)
Recidivism Status				
Non-recidivist offender	641 (53.4%)	1782 (51.4%)	167 (45.3%)	825 (54.2%)
Recidivist offender	60 (46.6%)	1687 (48.6%)	202 (54.7%)	697 (45.8%)

Note: The released offender was regarded as "employed," if he or she was employed at least one quarter in any given year in the study period. On the other hand, the released offender was regarded as "unemployed," if he or she had never been employed since release from IDOC custody in 2005.

Results of this study also revealed that a majority of 3,469 non-violent offenders were African American males in the age range of 20-40 years old. A majority of 3,469 non-violent offenders had a high school diploma or GED (n=1,856), but 33.5 percent (n=1,161) of non-violent offenders had an education below high school. 38.2 percent (n=1,326) of 3,469 non-violent offenders had never been employed after release from prison. The post-release recidivism rate was 48.6 percent among 3,469 non-violent offenders in the study period of 2005-2009.

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In regard to characteristics of sex offenders, results of this study revealed that a majority of 369 sex offenders were Caucasian males. Approximately 88.6 percent (n=327) of sex offenders were in the age range of 20-50 years old and the mean age of 369 sex offenders was 36.5 years old. Almost half of 369 sex offenders had a high school diploma or GED, but 41.7 percent (n=154) of sex offenders had an education below high school. 36.3 percent (n=134) of 369 sex offenders had never been employed after release from prison. The post-release recidivism rate was 54.7 percent among 369 sex offenders in the study period of 2005-2009.

This study found that a vast majority of 1,522 drug offenders were African American males in the age range of 20-40 years old. There were 52.2 percent (n=794) of 1,522 drug offenders with a high school diploma or GED, but 38.2 percent (n=582) of drug offenders had an education below high school prior to release from prison. Results of this 5-year follow-up study also revealed that 36.9 percent (n=561) of 1,522 drug offenders had never been employed after release from prison. The post-release recidivism rate was 45.8 percent among 1,522 drug offenders in the study period of 2005-2009.

Table 2: The Unemployment Rate among Offenders after the Initial Release in 2005 (Excluding Offenders Who Were Incarcerated in that Given Time Period)

Time Period	All Offenders	Violent Offenders	Non-Violent Offenders	Sex Offenders	Drug Offenders
2005 1st Quarter	96.4%	95.5%	96.4%	96.6%	96.5%
2005 2nd Quarter	95.7%	96.5%	95.5%	96.6%	95.3%
2005 3rd Quarter	93.5%	92.9%	93.3%	94.3%	94.4%
2005 4th Quarter	92.7%	91.6%	92.9%	93.5%	93.1%
2006 1st Quarter	63.1%	61.0%	64.8%	61.6%	61.1%
2006 2nd Quarter	61.7%	59.2%	63.3%	59.4%	60.7%
2006 3rd Quarter	62.0%	58.6%	63.5%	56.2%	62.6%
2006 4th Quarter	63.9%	61.8%	64.7%	59.1%	64.6%
2007 1st Quarter	69.7%	68.7%	70.8%	64.3%	69.4%
2007 2nd Quarter	69.1%	65.6%	70.3%	65.0%	70.3%
2007 3rd Quarter	67.4%	64.7%	68.8%	62.9%	67.6%
2007 4th Quarter	70.0%	68.3%	70.9%	65.6%	70.1%
2008 1st Quarter	73.8%	73.7%	74.8%	71.3%	72.3%
2008 2nd Quarter	73.3%	72.9%	74.2%	69.5%	72.3%
2008 3rd Quarter	74.3%	73.8%	75.9%	67.4%	72.6%
2008 4th Quarter	76.6%	75.9%	77.4%	71.0%	76.8%
2009 1st Quarter	80.7%	79.8%	82.2%	76.3%	79.3%
2009 2nd Quarter	80.2%	80.4%	80.8%	73.2%	80.4%
2009 3rd Quarter	81.2%	81.5%	81.9%	78.1%	80.4%
2009 4th Quarter	78.3%	78.6%	78.9%	77.0%	77.1%

Table 2 illustrates the unemployment rates, based on a quarterly measure in the study period of 2005-2009, among a cohort of 6,561 offenders who were released from IDOC custody throughout 2005. Results of this study clearly showed that ex-offenders had a considerably higher unemployment rate than that of the general population in any given time period during the study period of 2005-2009, regardless of types of offenders and economic conditions (e.g., recession). Most surprisingly, this study's results revealed that

offenders had encountered tremendous difficulties in finding a job within a short period of time upon release from prison. In all 4 quarters of 2005, the unemployment rates were in the range of 92-97 percent for released offenders.

Thereafter, the unemployment rates steadily decreased into the range of 60 percent during the pre-recession period (from 1st quarter of 2006 to 3rd quarter of 2007). In other words, ex-offenders would likely be employed in a variety of industrial sectors during a strong economic condition, but the unemployment rates remained relatively higher than the general population. However, the unemployment rates increased into the range of 70 percent during the recession period (from 4th quarter of 2007 to 4th quarter of 2008) and became even higher during the post-recession period (from 1st quarter of 2009 to 4th quarter of 2009). There was a similar pattern of unemployment rates across different types of ex-offenders (i.e., violent, non-violent, sex, and drug offenders) in the study period of 2005-2009.

Table 3: Elapsed Time between Re-incarceration and the Initial Release

Time Return	All Offenders (n=3144)	Violent Offenders (n=559)	Non-Violent Offenders (n=1687)	Sex Offenders (n=202)	Drug Offenders (n=696)
Within 3 months	204 (6.5%)	27 (4.8%)	126 (7.5%)	10 (5.0%)	41 (5.9%)
Within 3-6 months	404 (12.8%)	65 (11.6%)	203 (12.0%)	36 (17.8%)	100 (14.4%)
Within 6-9 months	449 (14.3%)	64 (11.4%)	249 (14.8%)	31 (15.3%)	105 (15.1%)
Within 9-12 months	413 (13.1%)	75 (13.4%)	245 (14.5%)	25 (12.4%)	68 (9.8%)
Within 12-15 months	346 (11.0%)	59 (10.6%)	182 (10.8%)	23 (11.4%)	82 (11.8%)
Within 15-18 months	301 (9.6%)	49 (8.8%)	163 (9.7%)	17 (8.4%)	72 (10.3%)
Within 18-21 months	243 (7.7%)	54 (9.7%)	125 (7.4%)	17 (8.4%)	47 (6.8%)
Within 21-24 months	187 (5.9%)	36 (6.4%)	101 (6.0%)	9 (4.5%)	41 (5.9%)
Within 24-27 months	154 (4.9%)	38 (6.8%)	67 (4.0%)	11 (5.4%)	38 (5.5%)
Within 27-30 months	89 (2.8%)	13 (2.3%)	39 (2.3%)	7 (3.5%)	30 (4.3%)
Within 30-33 months	46 (1.5%)	11 (2.0%)	24 (1.4%)	2 (1.0%)	9 (1.3%)
Within 33-36 months	11 (0.3%)	2 (0.4%)	6 (0.4%)	1 (0.5%)	2 (0.3%)
Within 36-39 months	11 (0.3%)	3 (0.5%)	8 (0.5%)	0 (0.0%)	0 (0.0%)
Within 39-42 months	31 (1.0%)	5 (0.9%)	20 (1.2%)	0 (0.0%)	6 (0.9%)
Within 42-45 months	60 (1.9%)	12 (2.1%)	33 (2.0%)	1 (0.5%)	14 (2.0%)
Within 45-48 months	59 (1.9%)	17 (3.0%)	31 (1.8%)	2 (1.0%)	9 (1.3%)
Within 48-51 months	65 (2.1%)	15 (2.7%)	32 (1.9%)	4 (2.0%)	14 (2.0%)
Within 51-54 months	44 (1.4%)	10 (1.8%)	19 (1.1%)	5 (2.5%)	10 (1.4%)
Within 54-57 months	22 (0.7%)	3 (0.5%)	11 (0.7%)	1 (0.5%)	7 (1.0%)
Within 57-60 months	5 (0.2%)	1 (0.2%)	3 (0.2%)	0 (0.0%)	1 (0.1%)

Table 3 provides detailed information about the survival time (i.e., elapsed time between release and return) among recidivist offenders. The recidivism rate among 6,561 ex-offenders, within a 5-year (2005-2009) follow-up study period, was 47.9 percent. Regardless of types of offenders, approximately 47 percent of recidivist offenders were re-incarcerated within a year, and 81 percent of recidivist offenders were re-incarcerated within 2 years, after the initial release in 2005. This study's results also indicated that a notable number of ex-offenders were likely to be re-incarcerated within 12 months after

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the initial release from prison. Precisely, this study found that the re-incarceration rates (by quarter) among recidivist offenders were: 6.5 percent (n=204) within 3 months, 12.8 percent (n=404) within 3-6 months, 14.3 percent (n=449) within 6-9 months, and 13.1 percent (n=413) within 9-12 months.

Variations in the survival time among different types of ex-offenders were not significant. As Table 3 illustrates, 41.3 percent (n=231) of 559 recidivist violent offenders were re-incarcerated within 12 months (i.e., 1 year), and 76.7 percent (n=429) were re-incarcerated within 24 months (i.e., 2 years), after the initial release in 2005. Additionally, 48.8 percent (n=823) of 1,687 recidivist non-violent offenders were re-incarcerated within 12 months, and 82.6 percent (n=1,394) were re-incarcerated within 24 months, after the initial release in 2005. In regard to 202 recidivist sex offenders, 50.5 percent (n=102) were re-incarcerated within 12 months, and 83.2 percent (n=168) were re-incarcerated within 24 months, after the initial release in 2005. Results of this study also revealed that 45.1 percent (n=314) of 696 recidivist drug offenders were re-incarcerated within 12 months, and 79.9 percent (n=556) were re-incarcerated within 24 months, after the initial release in 2005. In short, this 5-year follow-up study found that ex-offenders were more likely to return to prison within 2 years of the initial release, regardless of types of offenders.

Table 4: Legal Reasons of Re-incarceration among Recidivist Offenders after the Initial Release

Legal Reason	All Offenders (n=2089)	Violent Offenders (n=343)	Non-Violent Offenders (n=1152)	Sex Offenders (n=143)	Drug Offenders (n=451)
committing new crime	684 (32.7%)	87 (25.4%)	432 (37.5%)	39 (27.3%)	126 (27.9%)
technical parole violation	455 (21.8%)	73 (21.3%)	234 (20.3%)	45 (31.5%)	103 (22.8%)
parole violation	250 (12.0%)	58 (16.9%)	130 (11.3%)	13 (9.1%)	49 (10.9%)
technical probation violation	474 (22.7%)	83 (24.2%)	248 (21.5%)	40 (28.0%)	103 (22.8%)
probation violation	49 (2.3%)	16 (4.7%)	25 (2.2%)	0 (0.0%)	8 (1.8%)
other violations	177 (8.5%)	26 (7.6%)	83 (7.2%)	6 (4.2%)	62 (13.7%)

Note #1: The category of "other violations" includes such violations as escape or a violation of *Community Transition Program*.

Note #2: There were 1,055 recidivist offenders (217 recidivist violent offenders, 534 recidivist non-violent offender; 59 recidivist sex offenders, and 245 recidivist drug offenders) in a total of 3,144 recidivist offenders, whose legal reasons for returning to IDOC custody were unknown.

Upon further examination, of the data, it was discovered that 33.5 percent (n=1,055) of a total of 3,144 recidivist offenders had no information regarding the legal reasons for re-incarceration. Based on available legal information, as Table 4 indicates, this study found that 32.7 percent (n=684) of 2,089 recidivist offenders had committed a new crime, 33.8 percent (n=705) had a parole violation or a technical parole violation, 25.0 percent (n=523) had a probation violation or a technical probation violation, and 8.5 percent (n=177) had other violations (e.g., a violation of early-release-related *Community Transition Program*).

This study also revealed some variations in the legal reasons for re-incarceration among different types of ex-offenders. As Table 4 illustrates, major legal reasons for re-incarceration among 342 recidivist violent offenders included committing a new crime (25.4%), having a technical probation violation (24.2%), having a technical parole violation (21.3%), or having a parole violation (16.9%). The most prominent legal reason for re-incarceration among 1,152 recidivist non-violent offenders was committing a new crime (37.5%). Results of this study also showed that a notable number of ex-offenders were re-incarcerated because of either a technical parole or probation violation. Particularly, the primary legal reasons for re-incarceration among 143 recidivist sex offenders were a technical parole violation (31.5%) or a technical probation violation (28.0%). Meanwhile, three (3) main legal reasons for re-incarceration among 451 recidivist drug offenders included committing a new crime (27.9%), having a technical parole violation (22.8%), or having a technical probation violation (22.8%). The results of this study consistently showed that a vast majority of ex-offenders were re-incarcerated because of technical or regular parole or probation violations, regardless of the offender's classification.

Table 5: Logistic Multiple Regression Analyses of Post-Release Recidivism among Different Types of Offenders

Variable	All Offenders (N=6,561)	Violent Offenders (n=1,201)	Non-Violent Offenders (n=3,469)	Sex Offenders (n=369)	Drug Offenders (n=1,522)
Offender Race	-.141*	-.108	-.202**	-.343	-.142
Offender Gender	.187*	.471	-.219*	-.002	.103
Offender Age	-.019***	-.018**	-.015***	-.034**	-.033***
Offender Education	-.380***	-.555***	-.376***	-.453*	-.181
Employment Status	-.374***	-.352**	-.290***	-.505*	-.539***
Constant	.034	-.833	-.057*	1.289	1.003*

Note #1: "*" denotes that coefficient is statistically significant at 0.05 level, "**" at 0.01 level, and "***" at 0.001 level.

Note #2: Due to a relatively small number of Hispanic and Asian offenders in the sample, those offenders were not included in the logistic multiple analyses.

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Table 5 illustrates logistic multiple regression analyses of post-release recidivism among a cohort of 6,561 offenders, while controlling for the offender's classification. Specifically, this study examined the effects of the offender's characteristics (i.e., ethnicity, gender, age, and education) and post-release employment on recidivism. Results of logistic multiple regression analysis (the *All Offenders* equation -- Table 5) indicated that the offender's demographical characteristics (i.e., ethnicity, gender, and age), education, and post-release employment were statistically and significantly correlated ($p<.05$) with recidivism. In other words, this study found that African American offenders, male offenders, or younger offenders were likely to become recidivist offenders after their release from prison. Most importantly, this study's results revealed that the offender's education and employment were the most important predictors of recidivism. Specifically, ex-offenders were more likely to be re-incarcerated if they were uneducated (or under-educated) or unemployed.

In regard to 1,201 violent offenders, results of the logistic multiple regression analysis (the *Violent Offenders* equation -- Table 5) showed that an offender's age and education were statistically correlated ($p<.05$) with post-release recidivism. This study's results revealed that recidivist violent offenders were likely to be younger offenders, uneducated (or under-educated), or unemployed. Particularly, this study found that recidivist violent offenders were likely to be under age of 30 and without a high school credential prior to release from prison. Meanwhile, post-release employment was statistically but negatively correlated ($p<.001$) with recidivism among violent offenders. Results of this study clearly showed that violent offenders would likely become recidivists if they were unemployed after release from prison.

Among 3,469 non-violent offenders, results of the logistic multiple regression analysis (the *Non-Violent Offenders* equation -- Table 5) showed that an offender's characteristics (i.e., ethnicity, gender, age, and education) and post-release employment were statistically correlated ($p<.05$) with recidivism. Specifically, this study revealed that recidivist non-violent offenders were likely to be younger, male, and African American offenders who were uneducated (or under-educated) or unemployed after release from prison. Most importantly, post-release employment was an important predictor of recidivism among non-violent offenders. In other words, non-violent offenders would likely become recidivists if they were unemployed after release from prison.

Results of the logistic multiple regression analysis (the *Sex Offenders* equation -- Table 5) showed that an offender's age and education were statistically correlated ($p<.05$) with recidivism among 369 sex offenders. Specifically, this study revealed that recidivist sex offenders were likely to be younger offenders or uneducated (or under-educated). Meanwhile, this study found that post-release employment was also statistically, but negatively, correlated ($p<.05$) with recidivism. In other words, sex offenders would likely become recidivists if they were unemployed after release from prison. However, results of this study showed an offender's race and gender had no effect on recidivism among sex offenders.

In regard to 1,522 drug offenders, results of the logistic multiple regression analysis (the *Drug Offenders* equation -- Table 5) showed only an offender's age and post-release employment were statistically correlated ($p<.001$) with recidivism. Specifically, this study found that younger drug offenders, who were under age of 30, were likely to be recidivist offenders after release from prison. Meanwhile, post-release employment was the most important predictor of recidivism among drug offenders. In other words, drug offenders would likely become recidivists if they were unemployed after release from prison. This

study's results showed that an offender's race, gender and education had no effect on recidivism among drug offenders.

Discussion

Undoubtedly, post-release recidivism has been used frequently as the benchmark to evaluate the success (or failure) of the criminal justice system. If recidivism remains relatively high among ex-offenders, the general public casts doubt on the effectiveness of correctional interventions or behavioral modifications for incarcerated offenders. Even though many studies of ex-offenders have broadened our knowledge about plausible elements contributing to recidivism, there was a need to conduct a longitudinal study and to examine the patterns of the post-release recidivism in different economic conditions.

Consistent with findings from previous studies (see, for examples, Berg & Huebner, 2011; La Vigne, et al., 2008; Matsuyama & Prell, 2010), this 5-year follow-up study found that ex-offenders would likely become recidivists if they were unemployed after release from prison. At its core, post-release employment was the major predictor of recidivism, regardless of an offender's classification (i.e., violent, non-violent, sex, and drug offenders). The most notable finding from this study was, as Table 2 indicates, that virtually all ex-offenders could not find a job and the unemployment rates were in the range of 92-97 percent within 1-3 quarters of release from prison. Among 1,755 offenders released in the 1st quarter of 2005, for example, the unemployment rates were 92.3 percent in the 1st quarter of 2005, 93.9 percent in the 2nd quarter of 2005, 92.7 percent in the 3rd quarter of 2005, and 93.1 percent in the 4th quarter of 2005. Meanwhile, the recidivism rate was 50.6 percent among 1,630 "unemployed" offenders who were released in the 1st quarter of 2005. Undoubtedly, the effect of "unemployment" on recidivism was significant.

Results of this study also indicated that ex-offenders encountered tremendous difficulties finding employment upon release from prison and these difficulties persisted throughout several quarters after release, either during a strong economic condition or in the recessionary period. Obviously, the economic recession had a negative impact on the post-release employment among ex-offenders. The unemployment rates were almost 7 times higher than that among the general population during the period of recession (from 4th quarter of 2007 to 4th quarter of 2008), and it continued to increase during the post-recession period (1st quarter of 2009 to 4th quarter of 2009). In addition to a weak economic condition and competing with the general population for limited job opportunities, previous researchers illustrated a variety of other plausible reasons, such as criminal background checks (see, for examples, Holzer, et al., 2004; Pettit & Lyons, 2007; Travis, 2005), that prevented ex-offenders from being employed in an array of industrial sectors after release from prison.

A further examination of "employed" ex-offenders, who had a job at least 1 quarter during the study period of 2006-2009 (after they were released from prison throughout 2005), revealed the patterns of employment among ex-offenders changed significantly during the recessionary period. There was a 37.5 percent decrease in employment among ex-offenders from 2006 to 2009. (There were 2,620 offenders in 2006, 2,143 offenders in 2007, 2,123 offenders in 2008, and 1,644 offenders in 2009 employed at least 1 quarter in that given year.) Meanwhile, several job sectors, such as construction or manufacturing, that traditionally had provided adequate job opportunities for ex-offenders, steadily declined during the recessionary period. This study found that employment in construction among ex-offenders steadily declined from 13.8 percent in 2006 to 9.0

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percent in 2009 and employment in manufacturing decreased from 20.6 percent in 2006 to 13.5 percent in 2009. Furthermore, results of this study also revealed that "temporary help services," which were primarily temporary-based minimum-wage jobs, had become the major job sources for ex-offenders before, during, and after the economic recession of 2008. Consequently, a vast majority of employed ex-offenders could be classified as "working poor" because more than 87 percent of employed ex-offenders had an annual income below $20,000 and approximately 66 percent had an annual income below $10,000.

Another notable finding from this 5-year follow-up study was that an offender's characteristics (e.g., age or education) had a significant impact on recidivism. Consistent with previous studies (Batiuk, 1997; Burke & Vivian, 2001; Nuttall et al., 2003; Vacca, 2004), this study found that offenders were likely to be recidivist offenders if they were uneducated (or under-educated). Specifically, this study's results revealed that the recidivism rate was 55.9 percent among offenders without a high school credential, 46.2 percent among offenders who had a high school diploma or GED, but only 31.0 percent among offenders with a college education. A further examination also showed some unique findings in regard to an offender's characteristics in post-release recidivism, while controlling for an offender's classification. Among ex-offenders without a high school credential, the recidivism rate was 56.4 percent among violent offenders, 56.8 percent among non-violent offenders, 63.6 percent among sex offenders, and 51.7 percent among drug offenders. Surprisingly, this 5-year follow-up study showed that the recidivism rate climbed to 70.1 percent among unemployed African American males under age of 30 without a high school credential. On the other hand, the recidivism rate was 64.4 percent among unemployed Caucasian males under the age of 30 without a high school credential. Undoubtedly, racial disparities in post-release recidivism, considering a variety of offender's characteristics, need to be further examined in future research.

Another striking finding was that this study found ex-offenders with multiple times of re-incarceration within a 5-year time span. Regardless of an offender's classification, 1,064 in a total of 6,561 released offenders returned to prison twice, 269 offenders returned to prison three (3) times, and 39 offenders returned to prison four (4) times since their initial releases in 2005. In other words, this study's results implicated that a notable number of ex-offenders frequently wandered from prison to the community and back with little stability after their initial releases in 2005. Taking violent offenders as an example, results of this study found that 27.4 percent (n=153) of 560 recidivist violent offenders returned to prison twice, 5.7 percent (n=32) returned to prison three times, and 1.1 percent (n=6) returned to prison four times since their initial releases in 2005. Most importantly, this unique feature of multiple re-incarcerations among ex-offenders, within a short period of time, may invoke future research reconsidering the fundamental elements in defining recidivism.

Conclusion

The lingering hangover of the economic recession likely will persist in the foreseeable future, creating difficulties for offenders looking for jobs upon release from prison. Results of this 5-year follow-up study clearly indicated that post-release employment was as an effective buffer for reducing recidivism among ex-offenders. However, ex-offenders usually lacked the education or professional skills needed to meet the ever-changing job demands from a variety of industrial sectors which might employ them, regardless of their

criminal background. This study found that more than 35 percent of 6,561 ex-offenders did not have a high school credential prior to release from prison and most of these individuals were under the age of 30. Furthermore, results of this study consistently revealed that younger offenders would likely become recidivists if they were unemployed and uneducated (or under-educated), regardless of their classification. A majority of young, unemployed, recidivists were re-incarcerated multiple times after the initial releases in 2005.

Undoubtedly, results of this 5-year follow-up study clearly implicated the need to enhance correctional education for incarcerated inmates in order to increase their employability after release from prison, which, in turn, would decrease recidivism. It is important to mention that the effect of correctional education on post-release employment and recidivism among ex-offenders has been recognized widely (Burke & Vivian, 2001; Mercer, 2009; Nuttall et al., 2003; Rose, et al., 2010; Stevens and Ward, 1997; Vacca, 2004). This study found that educated offenders were less likely than uneducated offenders to become recidivists. Arguably, correctional education could play a crucial role in reducing the cost of incarceration by reducing recidivism. Unfortunately, the funding for correctional education programs across the nation has been reduced due to shrinking state budgets and weak economic conditions. In particular, uneducated offenders would be less likely to reenter the community successfully and more likely to roam in and out of the criminal justice system during the span of their lifetimes. Both the financial and social cost for this may be immeasurable. However, it is anticipated that the present study's findings will extend our understanding of some of the contributing factors to recidivism and provide some insights for future research to continuously study the impact of economic conditions on post-release recidivism among ex-offenders.

References

Albright, S., & Denq, F. (1996). Employer attitudes toward hiring ex-offenders. *The Prison Journal*, *76*(2), 118-137.

Allen, J. (1988). Administering quality education in an adult correctional facility. *Community Services Catalyst*, *18*(4), 28-29.

Aos, S., Miller, M., & Drake, E. (2006). Evidence-*based adult corrections programs: What works and what does not*. Olympia, WA: Washington State Institute for Public Policy.

Backman, C. (2011). Vocabularies of motive among employers conducting criminal background checks. *Acta Sociologica*, *54*(1), 27-44.

Bales, W. D., & Piquero, A. R. (2012). Assessing the impact of imprisonment on recidivism. *Journal of Experimental Criminology*, *8*(1), 71-101.

Batiuk, M. (1997). The state of post secondary correctional education in Ohio. *Journal of Correctional Education*, *48*(2), 70-72.

Bellair, P. E., & Kowalski, B. R. (2011). Low-skill employment opportunity and African-American-White difference in recidivism. *Journal of Research in Crime and Delinquency*, *48*(2), 176-208.

Berg, M. T., & Huebner, B. M. (2011). Reentry and the ties that bind: An examination of social ties, employment, and recidivism. *Justice Quarterly*, *28*(1), 382-410.

Blomberg, T. G., Bales, W. D., & Piquero, A. R. (2012). Is educational achievement a turning point for incarcerated delinquents across race and sex? *Journal of Youth and Adolescence, 41*(2), 202-216.

International Journal of Criminal Justice Sciences
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Blumstein, A., & Larson, R. C. (1971). Problems in modeling and measuring recidivism. *Journal of Research in Crime and Delinquency*, *8*(2), 124-132.

Boudouris, J. (1984). Recidivism as a process. *Journal of Offender Counseling Services Rehabilitation*, *8*(3), 41-51.

Burke, L., & Vivian, J. (2001). The effect of college programming on recidivism rates at the Hampden County House of Correction: A 5-year study. *Journal of Correctional Education, 52*(4), 160-162.

Bushway, S. D. (2011). Labor markets and crime. In J. Q. Wilson & J. Petersilia (Eds.), *Crime and Public Policy* (pp. 183-209). New York: Oxford University Press.

Chappell, C. (2004). Post-secondary correctional education and recidivism: A meta-analysis of research conducted from 1990-1999. *Journal of Correctional Education, 55*(2), 148-169.

Clear, T. R., Rose, D. R., & Ryder, J. A. (2001). Incarceration and the community: The problem of removing and returning offenders. *Crime & Delinquency*, *47*(3), 335-351.

Cox, R. (2010). Crime, incarceration, and employment in light of the great recession. *The Review of Black Political Economy*, *37*(3-4), 283-294.

Durose, M. R., & Mumola, C. J. (2004). Profile of nonviolent offenders exiting state prisons. Bureau of Justice Statistics, Office of Justice Programs. U.S. Department of Justice, Washington, D.C.

Erisman, W., & Contardo, J. B. (2005). *Learning to reduce recidivism: A 50-state analysis of postsecondary correctional education policy*. Washington, DC: The Institute for Higher Education Policy.

Fabelo, T. (2002). The impact of prison education on community reintegration of inmates: The Texas case. *Journal of Correctional Education, 53*(3), 106-110.

Fashey, J., Roberts, C., & Engel, L. (2006). Employment *of ex-offenders: Employer perspectives*. Massachusetts Executive Office of Public Safety: Crime & Justice Institute.

Fehr, L. (2009). Reentry matters. *Correction Today*, *71*(6), 8-13.

Finn, P. (1998). Job placement for offenders in relation to recidivism. *Journal of Offender Rehabilitation, 28*(1/2), 89-106.

Fletcher, D. R. (1999). Ex-offenders and the labour market: A review of the discourse of social exclusion and consequences for crime and the New Deal. *Government and Policy*, *17*(4), 431-444.

Gendreau, P., Little, T., & Goggin, C. (1996). A meta-analysis of the predictors of adult offender recidivism: What works! *Criminology*, *34*(4), 575-608.

Giguere, R., & Dundes, L. (2002). Help wanted: A survey of employer concerns about hiring ex-convicts. *Criminal Justice Policy Review*, *13*(4), 396-408.

Guerino, P., Harrison, P. M., & Sabol, W. J. (2012). Prisoners *in 2010 (Revised)*. Washington, DC: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

Gunnison, E., & Helfgott, J. B. (2011). Factors that hinder offender reentry success: A view from community corrections officers. *International Journal of Offender Therapy and Comparative Criminology*, *55*(2), 287-304.

Hannon, L., & DeFina, R. (2010). The state of the economy and the relationship between prisoner reentry and crime. *Social Problems*, *57*(4), 611-629.

Harlow, C. (2003). Education and correctional populations. *Bureau of Justice Statistics, U.S. Department of Justice*.

Harris, P. M., & Keller, K. S. (2005). Ex-offenders need not apply: The criminal background check in hiring decisions. *Journal of Contemporary Criminal Justice*, *21*(1), 6-30.

Harrison, B., & Schehr, R. C. (2004). Offenders and post-release jobs: Variables influencing success and failure. *Journal of Offender Rehabilitation, 39*(3), 35-68.

Hemphill, J. F., Hare, R. D., & Wong, S. (1998). Psychopathy and recidivism: A review. *Legal and Criminological Psychology*, 3(1), 139-170.

Hoffman, P.B., & Stone-Meierhoefer, B. (1980). Reporting recidivism rates: The criterion and follow-up issues. *Journal of Criminal Justice*, *8*(1), 53-60.

Hollin, C. R., & Palmer, E. J. (2009). Cognitive skills programmes for offenders. *Psychology, Crime & Law, 15*(2&3), 147-164.

Holzer, H. J., Raphael, S., & Stoll, M. A. (2006). Perceived criminality, criminal background checks, and the racial hiring practices of employers. *Journal of Law and Economics*, *49*(2), 451-480.

Klimecki, M. R., Jenkinson, J., & Wilson, L. (1994). A study of recidivism among offenders with an intellectual disability. *Journal of Intellectual and Developmental Disability*, *19*(3), 209-219.

Kubrin, C. E., & Stewart, E. A. (2006). Predicting who reoffends: The neglected role of neighborhood context in recidivism studies. *Criminology*, *44*(1), 165-197.

Langan, P. A., Schmit, E. L., & Durose, M. R. (2003). Recidivism of sex offenders released from prison in 1994. Bureau of Justice Statistics, Office of Justice Programs. U.S. Department of Justice, Washington, D.C.

Latessa, E. J., & Holsinger, A. (1998). The importance of evaluating correctional programs: Assessing outcome and quality. *Corrections Management Quarterly*, *2*(4), 22-29.

La Vigne, N., Davies, E., Palmer, T., & Halberstadt, R. (2008). *Release planning for successful reentry: A guide for corrections, service providers, and community groups*. Washington, DC: Urban Institute, Justice Policy Center.

Lukies, J., Graffam, J., & Shinkfield, A. J. (2011). The effect of organizational context variables on employer attitudes toward employability of ex-offenders. *International Journal of Offender Therapy and Comparative Criminology*, *55*(3), 460-475.

Matsuyama, K, & Prell, L. (2010). Education, employment and offender reentry. *Corrections Today*, *72*(4), 90-91.

Maxfield, L. D. (2005). Measuring recidivism under the federal sentencing guidelines. *Federal Sentencing Reporter*, *17*(3), 166-170.

Maxwell, S. R. (2005). Rethinking the broad sweep of recidivism: A task for evaluators. *Criminology & Public Policy*, *4*(3), 519-526.

Mears, D.P., & Mestre, J. (2012). Prisoner reentry, employment, signaling, and the better identification of desisters. *Criminology & Public Policy*, *11*(1), 5-15.

Mears, D.P., Wang, X., Hay, C., & Bales, W.D. (2008). Social ecology and recidivism: Implications for prisoner reentry. *Criminology*, *46*(2), 301-340.

Mercer, K. (2009). The importance of funding postsecondary correctional educational programs. *Community College Review*, *37*(2), 153-164.

Nally, J. M., Lockwood, S. R., Ho, T., & Knutson, K. (2012). The post-release employment and recidivism among different types of offenders with a different level of education: A 5-year follow-up study in Indiana. *Justice Policy Journal*, *9*(1), 1-29.

International Journal of Criminal Justice Sciences
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Nally, J. M., Lockwood, S. R., & Ho, T. (2011). Employment of ex-offenders during the recession. *Journal of Correctional Education*, *62*(2), 117-131.

Needels, K. E. (1996). Go directly to jail and do not collect?: A long-tem study of recidivism, employment, and earnings patterns among prison releases. *Journal of Research in Crime and Delinquency*, *33*(4), 471-496.

Nuttall, J., Hollmen, L., & Staley, M. (2003). The effect of earning a GED on recidivism rates. *Journal of Correctional Education, 54*(3), 90-94.

Pettit, B., & Lyons, C. J. (2007). Status and the stigma of incarceration: The labor-market effects of incarceration, by race, class, and criminal involvement. In S. Bushway & M. A. Stoll (eds.), *Barriers to reentry? The labor market for released prisoners in post-industrial America* (pp. 203-226). New York: Russell Sage Foundation.

Roman, J., Townsend, W., & Bhati, A. S. (2003). Recidivism rates for drug court graduates: Nationally based estimates. The Urban Institute, Washington, D.C.

Rose, C., Reschenberg, K., & Richards, S. (2010). The inviting convicts to college program. *Journal of Offender Rehabilitation*, *49*(4), 293-308.

Rossman, S., & Roman, C. (2003). Case-managed reentry and employment: Lessons from the opportunity to succeed program. Washington, DC: The Urban Institute, Justice Police Center.

Solomon, A., Visher, C., La Vigne, N., & Osbourne, J. (2006). *Understanding the challenges of prisoner reentry: Research findings from the Urban Institute's prisoner reentry portfolio*. Washington, DC: The Urban Institute.

Steurer, S.J., & Smith, L.G. (2003). *Education reduces crime: Three-state inmate recidivism study*. Lantham, MD: Correctional Education Association.

Steurer, S. J., Smith, L., & Tracy, A. (2001). *Three state recidivism study*. Lantham, MD: Correctional Education Association.

Stevens, D., & Ward, C. (1997). College education and recidivism: Educating criminals is meritorious. *Journal of Correctional Education*, *48*(3), 106-111.

Stoll, M. A., & Bushway, S. D. (2008). The effect of criminal background checks on hiring ex-offenders. *Criminology & Public Policy*, 7(3), 371-404.

Travis, J. (2005). But *they all come back: Facing the challenges of prisoner reentry*. Washington, DC: The Urban Institute.

Tripodi, S. J., Kim, J. S., & Bender, K. (2010). Is employment associated with reduced recidivism?: The complex relationship between employment and crime. *International Journal of Offender Therapy and Comparative Criminology*, *54*(5), 706-720.

Uggen, C. (2000). Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review, 67*(3), 529-546.

Uggen, C., & Staff, J. (2001). Work as a turning point for criminal offenders. *Corrections Management Quarterly, 37*(4), 347-368.

U.S. Department of Labor. (2012). *Labor force statistics from the current population survey*. Washington, DC: Bureau of Labor Statistics.

Vacca, J. (2004). Educated Prisoners Are Less Likely to Return to Prison. *Journal of Correctional Education, 55*(4), 297-305.

Varghese, F. P., Hardin, E. E., Bauer, R. L., & Morgan, R. D. (2010). Attitudes toward hiring offenders: The roles of criminal history, job qualifications, and race. *International Journal of Offender Therapy and Comparative Criminology*, *54*(5), 769-782.

Visher, C. A., Winterfield, L., & Coggeshall, M. B. (2005). Ex-offender employment programs and recidivism: A meta-analysis. *Journal of Experimental Criminology*, *1*(3), 295-316.

Visher, C., Bebus, S., & Yahner, J. (2008). Employment *after prison: A longitudinal study of releases in three states*. Washington, DC: The Urban Institute.

Vrieze, S. I., & Grove, W. M. (2010). Multidimensional assessment of criminal recidivism: Problems, pitfalls, and proposed solutions. *Psychological Assessment*, 22(2), 382-395.

Wadsworth, T. (2006). The meaning of work: Conceptualizing the deterrent effect of employment on crime among young adults. *Sociological Perspectives*, *49*(3), 343-368.

Wang, X., Mears, D. P., & Bales, W. D. (2010). Race-specific employment contexts and recidivism. *Criminology*, *48*(4), 1171-1211.

Wehrman, M. M. (2010). Race, concentrated disadvantage, and recidivism: A test of interaction effects. *Journal of Criminal Justice*, *38*(4), 538-544.

Wilson, D. B., Gallagher, C. A., & MacKenzie, D. L. (2000). A meta-analysis of correction-based education, vocation, and work programs for adult offenders. *Journal of Research in Crime and Delinquency, 37*(4), 347-368.

Winterfield, L., Coggeshall, M., Burke-Storer, M., & Correa, V. (2009). *The effects of postsecondary correctional education—Final report*. Urban Institute, Washington, DC: Justice Policy Center.

STATE OF MICHIGAN
MI Court of Appeals

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LEONARD WILSON V MEIJER GREAT LAKES LIMITED PARTNERSHIP	349078

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Opinion and Order of the Court of Appeals
July 1, 2021

STATE OF MICHIGAN

COURT OF APPEALS

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

UNPUBLISHED
July 1, 2021

No. 349078
Ingham Circuit Court
LC No. 18-000711-AE

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Claimant, Leonard Wilson, appeals by leave granted[1] the trial court order affirming the Michigan Compensation Appellate Commission's (MCAC's) decision that claimant was not eligible for unemployment benefits because under MCL 421.29(1)(a)'s "no show, no call" provision he was considered to have voluntarily left employment. We affirm for the reasons stated in this opinion.

I. BASIC FACTS

Claimant worked for Meijer Great Lakes Limited Partnership. Meijer requires "store team members," such as claimant, to call in any absences at least an hour before the start of a scheduled shift. Claimant did not appear for his scheduled shifts on five consecutive workdays (Monday, September 4, 2017, to Friday, September 8, 2017). Although he called in on September 5 to explain that he would not be in that day due to "unusual circumstances," he did not do so before his shift was scheduled to start. The "unusual circumstances" were that claimant had been arrested

[1] This Court initially denied claimant's application. *Wilson v Meijer Great Lakes Ltd Partnership*, unpublished order of the Court of Appeals, entered October 1, 2019 (Docket No. 349078). Claimant appealed to the Supreme Court, and that Court remanded to this Court "for consideration as on leave granted." *Wilson v Meijer Great Lakes Ltd Partnership*, 505 Mich 1084 (2020).

on a narcotic charge and was in jail. The record reflects that the September 5 call was a courtesy call. Claimant could not afford to make additional calls and his employer did not accept collect calls.

The record reflects that claimant was aware that Meijer had a policy of terminating employees after three consecutive days without coming to work or calling in. Further, Meijer's attendance policy required store team members to "provide notice [that the employee will be absent] no less than sixty (60) minutes prior to the shift start time." The policy also provided that "[a]ll team members should notify their leadership of an absence in accordance with the procedures specified by their work location." Because claimant was absent from work for three consecutive days without calling in, his employment was terminated after he did not appear for work on September 8, 2017.

Thereafter, claimant sought unemployment benefits, but was determined (and redetermined) to be ineligible. He appealed and a hearing was set before an administrative law judge (ALJ). In pertinent part, the ALJ determined that claimant was "disqualified from receiving benefits under the voluntary leaving provision, Section 29(1)(b) of the Act, beginning the week ending September 9, 2017." Claimant filed an appeal to the MCAC, which affirmed the ALJ's decision. The MCAC reasoned:

> A claimant who was absent for three days without notice has, as a matter of law, voluntarily left employment. See Section 29(1)(a) of the Act. A claimant is disqualified for benefits if the claimant left work without good cause attributable to the employer. A claimant who left work is presumed to have voluntarily done so without good cause. See Section 29(1)(a) of the Act. Good cause exists when the circumstance which prompted the claimant's leaving would have caused a reasonable, average and otherwise qualified employee to leave. See *Carswell v Share House, Inc[]*, 151 Mich App 392[; 390 NW2d 252] (1986).
>
> The claimant's separation is considered a leaving as he was absent without notice for 3 days. The claimant was absent without notice because he had been arrested and was jailed. The claimant's arrested [sic] and incarceration were not attributable to the employer. Consequently, the claimant is disqualified from benefits under Section 29(1)(a) of the Act and the ALJ's decision will be affirmed.

Claimant appealed to the circuit court, which affirmed. Relevant to this appeal, the circuit court's interpretation of the third sentence of MCL 421.29(1)(a), the "no show, no call" provision, was consistent with the interpretation used by the ALJ and the MCAC.[2]

[2] Effective December 29, 2020, this section was amended. See 2020 PA 258. Relevant to this matter, the third sentence of MCL 421.29(1)(a) now reads, "An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire *is* considered to have voluntarily left work without good cause attributable to the employer." MCL

II. STATUTORY INTERPRETATION

A. STANDARD OF REVIEW

Claimant argues that the court erred in its interpretation of MCL 421.29(1)(a). The proper interpretation of a statute is a question of law this Court reviews de novo on appeal. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). "Thus, concepts such as 'abuse of discretion' or 'clear error,' which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute." *Id*.

B. ANALYSIS

This case involves the proper interpretation of MCL 421.29(1)(a). "The primary goal of statutory interpretation is to give effect to the Legislature's intent." *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020). "Statutory interpretation begins with examining the plain language of the statute." *Id*. "When that language is clear and unambiguous, no further judicial construction is required or permitted." *Id*. "A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). "A statute is not ambiguous merely because a term it contains is undefined or has multiple definitions in a dictionary, especially when the term is read in context." *Id*. "When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law." *Id*.

At all times relevant to this appeal, MCL 421.29(1)(a) provided:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. *An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer*. An individual who becomes unemployed as a result of negligently losing a requirement

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421.29(1)(a) (emphasis added). As statutes and amendments to statutes are presumed to apply prospectively only absent a "clear, direct, and unequivocal expression" by the Legislature that an amendment apply retroactively, *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006), and the amendment to MCL 421.29(1)(a) contains no indication that it would apply retroactively, further references to MCL 421.29(1)(a) are to the version in effect before the 2020 amendment, unless stated otherwise.

> for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job. . . . [emphasis added.]

Claimant argues that the third sentence of MCL 421.29(1)(a) is ambiguous. We disagree. The word "shall" indicates a mandatory directive. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). In turn, "consider" is a transitive verb with a number of definitions. *Merriam-Webster's Collegiate Dictionary* (11th ed). To "consider" something can mean to "think about carefully," "to regard or treat in an attentive or kindly way," or "to gaze on steadily or reflectively." *Id*. Those definitions all contemplate thoughtfulness, or "consideration of," a subject. But another definition of the word "consider" is "to come to judge or classify." *Id*.

Based on the phrase "shall be considered," it is clear that it is the last definition that was intended by the legislature. Thus, if the statutory prerequisites are met, the person must be judged or classified as a person who voluntarily left work without good cause attributable to his or her employer. Any other construction would render meaningless the phrase, "shall be." Further, the Legislature did not state in the "no call, no show" provision that anyone should undertake any consideration—i.e., contemplative thought—of the circumstances. Rather, the Legislature used the word, "consider*ed*." Particularly when coupled with the phrase, "shall be," it is clear that the Legislature did not intend for any consideration of the underlying facts and circumstances causing an employee to fail to appear for work for three or more consecutive workdays without contacting their employer. Rather, the "no show, no call" provision of MCL 421.29(1)(a) is, in essence, a definition of one instance where an individual is, as a matter of law, deemed to have voluntarily left work without good cause.

Moreover, provisions must be read in the context of the entire statute so as to produce a harmonious whole. *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). Identical language in various provisions of the same act should be construed identically. *The Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009). Here in addition to the "no call, no show" provision in MCL 421.29(1)(a), the Legislature included another circumstance in which an individual "shall be considered" to have voluntarily left work. Specifically, the fourth sentence of MCL 421.29(1)(a) provides, "An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer." MCL 421.29(1)(a). Clearly, one who has lost a job due to negligence has not done so in what could be described as a truly "voluntary" manner. Claimant's desired interpretation of the "no show, no call" provision would require consideration of the underlying facts and circumstances, and ultimately, a decision whether the individual voluntarily

chose to fail to appear for work without contacting his or her employer. Doing so with regard to the "no show, no call" provision would seem to mean that in the later sentence concerning the loss of a job requirement, which uses the same operative language ("shall be considered"), the same analysis should be used. But doing so would be impossible. One cannot both *negligently* lose a job requirement and *intentionally*—i.e., "voluntarily," lose that same requirement. The obvious answer to this predicament is that the Legislature has deemed certain circumstances equivalent to "voluntarily" leaving work without good cause, even if those circumstances are not actually voluntary.

Claimant attempts to avoid this result by first claiming that the applicable test for determining if one has voluntarily left work was established in 1961 by *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201, 216; 108 NW2d 849 (1961). In that case, the Supreme Court interpreted what it meant for one's leaving of employment to be "voluntary." *Id*. at 203-204. The Court was only asked to interpret a provision stating that an individual was disqualified from receiving unemployment benefits if he or she left work voluntarily without good cause attributable to the employer or employing unit. *Id*. at 206-207. In other words, *Lyons* involved what is currently the first sentence of MCL 421.29(1)(a). The Legislature has now statutorily defined a circumstance that amounts to voluntarily leaving work without good cause attributable to the employer or employing unit—being a "no show, no call" for three consecutive workdays. MCL 421.29(1)(a). *Lyons* is not controlling as it did not interpret or apply the statutory language that is at issue in this appeal. Nor could it, given that the applicable statutory language was added to MCL 421.29(1)(a) in 2011—fifty years after *Lyons* was decided. See 2011 PA 269.

Claimant next turns to *Warren v Caro Comm Hosp*, 457 Mich 361; 579 NW2d 343 (1998). That case, too, was decided before the relevant statutory language was added to MCL 421.29(1)(a). *Warren* was, like *Lyons*, a case that turned on the more general question of whether an individual left work voluntarily. The Court held that the question was a two-part inquiry: first, one must ask if the individual left work voluntarily, which depends on the facts and circumstances of the individual case; and second, one must ask if the individual left without good cause attributable to the employer. *Warren*, 457 Mich at 366-367. That inquiry, however, is not relevant to this case. Since *Warren* was decided, the Legislature has created a set of circumstances that, as a matter of law, amounts to leaving work voluntarily without good cause attributable to the employer. Those set of circumstances exist in this case, so there is no need to conduct the analysis stated in *Warren*.

Next, claimant argues that his case is similar to *Tomei v Gen Motors Corp*, 194 Mich App 180; 486 NW2d 100 (1992). But that case also predates the enactment of the statutory language that controls the outcome in the present matter. And, like *Lyons* and *Warren*, *Tomei* asked whether an individual's leaving of employment was truly voluntary. *Tomei*, 194 Mich App at 184-188. In the present case, the question of whether claimant left work voluntarily and without good cause attributable to his employer is governed by the third sentence of MCL 421.29(1)(a). *Tomei* is thus of no relevance.

Claimant also contends that a "strict" construction of MCL 421.29(1)(a) runs counter to the plain language of the statute. However, it is claimant's attempt to rewrite clear and unambiguous statutory language that is improper. In the second sentence of MCL 421.29(1)(a), the Legislature created a presumption that, by leaving work, one has left work voluntarily and without good cause attributable to the employer. Claimant relies on that sentence to argue that this

same presumption should apply to the third sentence of MCL 421.29(1)(a). But the statutory language is clear: simply leaving work creates a presumption that may be rebutted, but failing to come to work for three consecutive workdays, and without contacting the employer in a manner acceptable to the employer, means that, as a matter of law, the individual has left work voluntarily. There is no mention of a "presumption" in the third sentence of MCL 421.29(1)(a); rather, this sentence states that the individual *shall be* considered to have left work voluntarily and without good cause attributable to the employer. There is no room for presumptions when it comes to the circumstances described by the third sentence of MCL 421.29(1)(a).

Claimant argues that the addition of the "no show, no call" provision merely "reclassified what would have been a misconduct case" under MCL 421.29(1)(b), "where the burden is on the employer to prove misconduct—into a voluntary quit case, where the claimant now bears the burden to rebut the voluntary quit provision." Therefore, according to claimant, the Legislature's purpose was simply to shift the burden from the employer to the claimant, not to create a situation where, as a matter of law, the individual is disqualified from receiving benefits. That, however, ignores the plain language of the statute, which clearly and unequivocally says that, where certain circumstances exist, the individual *shall be considered* to have voluntarily left work without good cause attributable to the employer. MCL 421.29(1)(a). Where statutory language is clear and unambiguous, this Court's task in construing the statute begins and ends with that plain language. *Scugoza v Metropolitan Direct Prop & Cas Ins Co*, 316 Mich App 218, 223; 891 NW2d 274 (2016).[3]

Claimant argues that a "strict liability" analysis is not appropriate. The ALJ could have used a different phrase than "strict liability." Indeed, this is not a strict-liability case; claimant bears no "liability" at all. Rather, what is at issue is whether claimant is disqualified from unemployment benefits. But wording aside, the ALJ's intent is clear: where certain circumstances exist, the result is controlled by the statute and follows as a matter of law, without regard to *why* those circumstances came to be. While one might disagree whether that is good policy, the fact of the matter is that the ALJ's construction of the statute is consistent with the plain language used by the Legislature. Whether one chooses to call that "strict liability" or something else is irrelevant.

Claimant notes that the overall purpose of the Act is to provide financial assistance to those who become unemployed, MCL 421.2(1), and that, viewed in that lens, MCL 421.29(1)(a) should not be read as creating any absolute bars to benefits. Claimant also correctly notes that, because the Act is a remedial statute, "it should be liberally construed to achieve its intended goal." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 417; 565 NW2d 844 (1997). But those general principles cannot change what the Legislature has stated with clarity in MCL 421.29(1)(a): those

[3] Moreover, the "misconduct" provision of MCL 421.29(1)(b) did not have any specific language addressing individuals who do not show up for work and do not call in an absence prior to the enactment of 2011 PA 269. See, e.g., MCL 421.29(1)(b), as enacted by 2008 PA 480. Rather, the "no call, no show" provision of MCL 421.29(1)(a) was a new provision added in 2011, via 2011 PA 269, that did not previously exist anywhere in the Act.

who fail to come to work for three consecutive workdays, and have not contacted their employer in a manner acceptable to the employer, cannot receive unemployment benefits. Although the Act's overall purpose is to provide monetary assistance to those who have lost their employment, there are circumstances in which one may lose their employment and also not be entitled to unemployment benefits. The Legislature has created exceptions where, despite the general purpose of the Act, unemployment benefits are simply not available. *Empire Iron Mining Partnership*, 455 Mich at 417-418. This case is one of those exceptions.[4]

III. CONCLUSION

In sum, the plain meaning of MCL 421.29(1)(a) disqualifies claimant from receiving unemployment benefits. While one can debate whether that is sound public policy, it is the law, and this Court cannot judicially rewrite the statute to conform to what some might wish for the statute to say. "It is not within the authority of the judiciary to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy." *Lash v City of Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007) (quotation marks and citation omitted).

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly

[4] Claimant also resorts to cases from other jurisdictions regarding those states' own "no call, no show" statutory provisions. But claimant fails to explain whether, in any of those states, the applicable statutory language is the same or similar to that contained in MCL 421.29(1)(a). Without that crucial link, claimant has not proven anything. And in any event, judicial opinions from other jurisdictions would be, at most, persuasive authority. See *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

Dissenting Opinion-Krause, J.
July 1, 2021

STATE OF MICHIGAN

COURT OF APPEALS

LEONARD WILSON,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,

Respondents-Appellees.

UNPUBLISHED
July 1, 2021

No. 349078
Ingham Circuit Court
LC No. 18-000711-AE

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent. I believe that when MCL 421.29(1)(a) is read in context, it reflects a Legislative intent to base disqualification for unemployment benefits on acts or omissions that were actually within the claimant's control. I therefore conclude that the MCAC erred in disqualifying claimant for benefits on the basis of MCL 421.29(1)(a)'s "no show, no call" provision.

I need not repeat the facts, most of which are thoroughly set forth by the majority. I add only that the ALJ discussed whether claimant could have made better efforts to acquire the funds necessary to call Meijer and comply with Meijer's leave policy. The ALJ opined that it was "possible," albeit "very difficult," that claimant could have acquired the funds, but never indicated that success was likely. Rather, the ALJ and the MCAC relied on treating MCL 421.29(1)(a) as setting forth an essentially "strict liability" test. I conclude that such a test contravenes the Legislature's intent.

The goal of statutory interpretation is to discern and give effect to the Legislature's intent, which begins by examining the language of the statute and applying plain and unambiguous language as written. *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020). However, in examining and considering the language of the statute, the statute must be read as a whole, and the language must be considered in the context of the entire statutory scheme. *Madugula v Taub*, 496 Mich 685, 81; 853 NW2d 75 (2014); *Honigman Miller*

Schwartz and Cohn LLP v City of Detroit, 505 Mich 284, 305-307; 952 NW2d 358 (2020). The courts may not simply cite "context" without further explication as an excuse to depart from the plain language of a statute, unless the language of the statute reflects some internal inconsistency. See *People v McIntire*, 461 Mich 147, 156 n 9; 599 NW2d 102 (1999). Nevertheless, to the extent any judicial construction of a statute is warranted, the courts should, to the extent possible, strive to avoid results that are absurd, unjust, or prejudicial to the public interest. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Even unambiguous language may be properly understood only by considering its context. *Tyler v Livonia Pub Schs*, 459 Mich 382, 390-392; 590 NW2d 560 (1999).

As the majority explains, at all times relevant to this appeal, MCL 421.29(1)(a) provided:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job. . . .

The majority analyzes the meaning of the phrase "shall be considered" in the third sentence of MCL 421.29(1)(a). In complete isolation, the majority's construction of that phrase is reasonable. However, although the majority recognizes that the clause must be considered in its wider statutory context, I respectfully disagree with the majority's attempts to do so.

MCL 421.2(1) states that the public policy of the state is to provide assistance to people who are involuntarily unemployed. MCL 421.8 states, in its first sentence, "A basic purpose of this act is to lighten the burden of involuntary unemployment on the unemployed worker and his family." Despite the clear importance of unemployment being involuntary, nowhere in the Employment Security Act, MCL 421.1 *et seq*, is the word "voluntary" or "involuntary" defined. According to *Merriam-Webster's Collegiate Dictionary* (11th ed), "involuntary" means "done

contrary to or without choice" or "not subject to control of the will." Consistent with this definition, our Supreme Court has held "involuntariness" within the meaning of the Employment Security Act to indicate the absence of realistically available reasonable alternatives, or the external imposition of constraints, irrespective of whether those constraints are a consequence of a voluntary act. *Lyons v Appeal Bd of Mich Employment Security Comm*, 363 Mich 201, 216; 108 NW2d 849 (1961); *Warren v Caro Comm Hosp*, 457 Mich 361, 365-369; 579 NW2d 343 (1998). This is further consistent with the fact that even true strict-liability crimes generally require the defendant to have an actual ability to act or to refrain from acting. *People v Likine*, 492 Mich 367, 392-398; 823 NW2d 50 (2012).

It would violate the explicitly stated Legislative intent and public policy underlying the act to construe "consider," for purposes of MCL 421.29(1)(a), as creating a disqualification based solely on whether an event occurred without taking into account whether the claimant is at fault. Such a construction is also inconsistent with the remainder of the statute, even in isolation. The fifth sentence states that the claimant "has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit." Consistent with the understanding of what it means to be "involuntary" everywhere else in the Act, this sentence indicates that claimants are entitled to show that their departure from work was not under their actual control. The majority cites the fourth sentence, which refers to "negligently losing a requirement for the job." However, the concept of negligence is based upon a person acting (or failing to act) with some degree of volition and control. See *Soule v Grimshaw*, 266 Mich 117, 119-120; 253 NW 237 (1934); see also *Zeni v Anderson*, 397 Mich 117, 136; 243 NW2d 270 (1976) ("[l]iability without fault is not truly negligence").

As the majority observes, it is not the role of the courts to craft public policies and interfere with the Legislature's decisions. *Lash v City of Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007). However, the Legislature has explicitly set forth an applicable public policy here. I would conclude that if the Legislature truly intended to create a strict liability bar to a claimant being permitted to verify that an absence from work was *actually* involuntary, contrary to its expressly stated intent underlying the Employment Security Act, it would need to do so unambiguously, and the third sentence of MCL 421.29(1)(a) is not so unambiguous. When read in context, I would conclude that it establishes a presumption, but not an insurmountable presumption. The fact that claimant used his one available courtesy call to contact Meijer, even if he failed to reach the correct person, is powerful evidence that claimant's absence from his work was not actually voluntary. I would hold that the MCAC and the trial court erred in treating as irrelevant whether claimant could have contacted Meijer pursuant to Meijer's policies.

/s/ Amy Ronayne Krause