

Connie Burgess - Memo MESC.doc

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Subject: Memo MESC.doc

**MEMORANDUM**

TO: Honorable Holly J. Hughes
RE: Admissibility of Testimony Concerning MESC Proceedings
DATE: September 27, 2011

I. INTRODUCTION:

The Michigan Employment Security Act, set forth at MCL § 421.1 *et seq.*, provides for 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.” Section 11 of the act, MCL § 421.11(b)(1) states that information obtained from any individual pursuant to the administration of the Michigan Employment Security Act (the “Act”), and determinations as to the benefit rights of any individual are confidential and shall not be disclosed or open to public inspection other than to public employees and officials in the performance of their official duties under the Act, and to agents or contractors of such public officials. In addition, MCLA § 421.11(b)(1)(iii) states that the information and determinations of the MESC shall not be used in any action or proceeding before any court or administrative tribunal unless the MESC 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 certain specified programs under the Act.

I. RATIONALE FOR AMENDMENT

In a recent court case in Saginaw County, Plaintiff brought suit against his employer claiming his employer had retaliated against him for filing a workers compensation claim and for age discrimination with regard to his termination. Plaintiff made statements attributable to his employer during the course of the trial that brought Plaintiff’s credibility squarely in front of the jury. In an effort to attack

Plaintiff's credibility, the employer sought to introduce evidence that the employee just 18 months earlier had made fraudulent statements to the MESC in order to obtain unemployment benefits. During the course of applying for and/or obtaining such benefits, Plaintiff was found to have defrauded both the MESC and the former employer because Plaintiff knowingly made false statements to the MESC with intent to defraud. The employee was required to repay his employer and the MESC for the unemployment benefits wrongfully obtained. Because of the impediments imposed by Section 11 of the Act, Plaintiff's fraudulent statements were not allowed into evidence to undermine his credibility.

As currently enacted MCLA § 421.11(b)(1) provides that information obtained from any individual pursuant to the administration of the Michigan Employment Security Act (the "Act"), and determinations as to the benefit rights of any individual are confidential and shall not be disclosed or open to public inspection other than to public employees and officials in the performance of their official duties under the Act, and to agents or contractors of such public officials. In addition, MCLA § 421.11 (b)(1)(iii) states that the information and determinations of the MESC shall not be used in any action or proceeding before any court or administrative tribunal unless the MESC 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 certain specified programs under the Act. As the statute provides the only exception is when the MESC is a party to the action.

In *Paschke v. Retool Industries*, 445 Mich. 502; 519 N.W.2d 441 (1994), the argument was raised that, by a person voluntarily testifying about representations made to the MESC, that person waived any privilege created by the Act thereto. However, the Act, as interpreted by the Supreme Court of Michigan, provides for an absolute privilege concerning information presented to the MESC, unless the MESC is a party to or complainant in the action. *Id.*, see also *Storey v. Meijer, Inc.*, 431 Mich. 376; 429 N.W.2d 169 (1988) and *Wojciechowski v. General Motors Corp.*, 151 Mich.App. 399, 406; 390 N.W.2d 727 (1986). There is no indication that the privilege created by the Act is subject to waiver by the parties. In short the Supreme Court interpreted the Act as written

Without providing an exception involving a civil suit between a recipient of unemployment benefits and his/her employer where evidence of conduct and statements made would otherwise be admissible pursuant to the Michigan Rules of Evidence, a potential plaintiff who knowingly commits

fraud upon his/her employer can do so with impunity. The employer could never bring up the employees fraud because of the statute as currently written. There are a myriad of circumstances where such conduct would clearly be relevant in a suit between and employee and employer, but as written the statute would prevent such information from ever being made public even in a court of law.

