IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-CC-02054-COA

STANLEY MCNEIL **APPELLANT**

v.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION AND TABER EXTRUSIONS **APPELLEES**

DATE OF TRIAL COURT JUDGMENT:	11/25/2002
TRIAL JUDGE:	HON. STEPHEN B. SIMPSON
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JOHN C. JOPLING JEREMY DAVID EISLER
ATTORNEY FOR APPELLEES:	ALBERT B. WHITE
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	AFFIRMED THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION'S DENIAL OF UNEMPLOYMENT BENEFITS
DISPOSITION:	AFFIRMED - 03/23/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

EN BANC.

CHANDLER, J., FOR THE COURT:

¶1. The Mississippi Employment Security Commission (MESC) denied McNeil's application for unemployment benefits. He appealed the denial to the Circuit Court of Harrison County, which affirmed the MESC's decision. He appeals to this Court, asserting three errors: (1) whether the appeals referee's finding that he violated his employer's attendance policy was supported by substantial evidence; (2) whether as a matter of law occasional and isolated incidents of tardiness and absence constitute misconduct; and

(3) whether as a matter of law the circuit court failed to give judicial effect to an administrative regulation adopted by the MESC. Finding no error, we affirm.

FACTS

¶2. Stanley McNeil worked as a laborer for Taber Extrusions from July 6, 2000 to December 12, 2001, when he was dismissed for excessive absenteeism. Taber had a "no fault" attendance policy. This policy provided that any absence or tardiness resulted in points being charged to an employee according to a sliding scale, with missing less than half the scheduled hours resulting in one half of a point, missing over half the scheduled hours resulting in three fourths of a point, and a full day absence resulting in one point. Under this policy, there were no "excused" absences for medical or any other reason; however, absences qualified under the Family and Medical Leave Act were not charged any points. The policy further provided that an employee's point accumulation for an absence or lateness would double if the employee failed to call to report the outage thirty minutes before the beginning of the employee's shift.

¶3. McNeil was dismissed after being assessed twelve and a half points for absenteeism within a rolling twelve month period. McNeil's attendance record indicates that, from July 20, 2001, until his termination, he was assessed five points for five absences and six points for three no-call absences. After returning from each absence, McNeil signed a pink card acknowledging the absence. When McNeil accumulated over four points, he received a written warning that he would be suspended if he accumulated eight points. When McNeil accumulated over eight points, he was suspended for three days, and received a written warning that he would be terminated if he accumulated twelve points. On December 4, 2001, McNeil incurred one and a half points when he missed over half of his scheduled hours and failed to call at least thirty minutes before the start of his shift. Because this occurrence pushed his total point accumulation to twelve and a half, McNeil was terminated.

¶4. The claims examiner denied McNeil's claim for unemployment benefits, and McNeil appealed. After an administrative hearing, the appeals referee denied unemployment benefits on the ground that McNeil was discharged due to misconduct. On appeal, the MESC's Board of Review adopted the findings of fact and opinion of the appeals referee, and the circuit court affirmed the Board's order.

STANDARD OF REVIEW

¶5. Appellate review of the MESC's Board of Review is limited to questions of law. Miss. Code Ann. § 71-5-531 (Rev. 2000). We will affirm the Board's findings of fact if such findings are supported by substantial evidence. *Mississippi Employment Security Commission v. Jones*, 826 So.2d 77, 79 (¶ 8) (Miss. 2002).

LAW AND ANALYSIS

I. WHETHER THE FINDING THAT MCNEIL VIOLATED THE ATTENDANCE POLICY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

¶6. An employee's failure to follow his employer's policy may constitute misconduct and disqualify him from receiving unemployment benefits. *Captain v. Mississippi Employment Security Commission*, 817 So. 2d 634 (¶18) (Miss. Ct. App. 2002). However, the employer bears the burden of proof in showing misconduct by clear and convincing evidence. *Trading Post, Inc. v. Nunnery*, 731 So.2d 1198, 1202 (¶15) (Miss.1999).

¶7. Before the MESC, McNeil made two challenges to the evidence showing that he had accumulated twelve and a half points under the attendance policy. Both challenges were premised upon McNeil's contention that Taber failed to carry the burden of proof that his conduct rose to the level of misconduct as defined in the attendance policy. Firstly, McNeil asserted that, on two occasions, he complied with the literal language of the attendance policy by contacting Taber within one half hour of the beginning of his

scheduled shift and notifying Taber that he was unable to work. The following phrase is the policy language in question: "[e]mployees are required to contact the company by calling . . . within 30 minutes prior to the start of their scheduled shift for any absence or tardiness."

¶8. McNeil asserted that the literal application of this policy only required the call to be made anytime within the thirty minutes prior to the beginning of the shift. We agree that the policy itself may have been incorrectly phrased, when taken to its literal extreme. However, Taber's human resources manager, Debbie Gaughf, testified that, operationally, the policy required the employee to call in no later than thirty minutes prior to his shift. McNeil admitted during his testimony that he understood that employees were required to call at least thirty minutes prior to the beginning of the shift. Therefore, McNeil's assertion that the attendance policy was literally construed was contradicted by substantial evidence concerning the actual operation and understanding of the attendance policy.

¶9. Secondly, McNeil asserted that several of his absences were excusable under the Family and Medical Leave Act (FMLA). 29 U.S.C.A. § 2612 (1993). Taber's undisputed practice was to refrain from assessing points for any employee absence covered by FMLA. Gaughf testified that Taber's practices included telling new employees that FMLA could apply to excuse absences from the attendance policy, and that notices concerning FMLA were posted at the work site. Gaughf also testified that Taber's procedure was that, when an employee returned from an absence or was tardy in reporting to work, the employee was required to tell his supervisor the reason for the absence or tardiness. The supervisor then completed a form reporting the occurrence and the stated reason. The supervisor sent this report to human relations, where a determination was made as to whether FMLA applied. McNeil contended that prior to his termination he did not know FMLA applied to the Taber attendance policy, and that at least one absence should have been covered and excused. On appeal, McNeil contends that this testimony was

unrebutted, and that, because he should not have been assessed more than twelve points under the attendance policy, the MESC decision is not supported by substantial evidence. While it may be true that one or more of McNeil's absences could have been excused, there is evidence showing that Taber advised McNeil of what he needed to do to bring such excuses to his supervisor's attention, and that McNeil failed to comply with that policy.

¶10. Where substantial evidence supports a finding that an employee showed a continuing disregard for the policies of his employer, a finding of misconduct will be affirmed. *Yarborough v. Mississippi Employment Security Commission*, 841 So. 2d 1193 (¶6) (Miss. Ct. App. 2003). In this case, the evidence supports a finding that McNeil failed to comply with Taber's attendance policy and its policy regarding FMLA. Therefore, this assertion of error is without merit.

II. WHETHER AS A MATTER OF LAW ISOLATED INCIDENTS OF TARDINESS OR ABSENCE CONSTITUTE MISCONDUCT AS REFERRED TO IN MISSISSIPPI CODE ANNOTATED SECTION 71-5-513 (SUPP. 2003).

¶11. McNeil argues that his absenteeism cannot be considered misconduct as a matter of law. Mississippi Code Annotated section 71-5-513 (A)(1)(b) provides that an employee terminated for misconduct connected with work is ineligible for unemployment benefits. The supreme court has defined the term "misconduct"as referred to in the statute as:

> conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer . . . mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion [are] not considered "misconduct" within the meaning of the statute.

Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982) (citing *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941)).

¶12. McNeil argues that the MESC failed to conduct any inquiry into whether McNeil's actions constituted misconduct as defined by *Wheeler*, and found McNeil guilty of misconduct solely because he violated the employer's attendance policy. McNeil correctly argues that an employee's violation of an employer's policy does not automatically constitute misconduct. Rather, an employee's conduct must manifest willful and wanton disregard of the employer's interest, as stated in *Wheeler*. *Mississippi Employment Security Commission v. Jones*, 755 So. 2d 1259, 1262 (¶¶ 10-11) (Miss. Ct. App. 2000).

¶13. Our review of the opinion of the appeals referee that was adopted by the Board reveals that the appeals referee applied *Wheeler* to the facts of this case. After reciting the standard from *Wheeler*, the appeals referee found that the facts demonstrated that McNeil willfully violated Taber's right to expect its employees to be at work on time and to give adequate notice of absences. The referee found that this evidence demonstrated misconduct.

¶14. We now turn to whether McNeil's conduct could constitute misconduct as a matter of law. McNeil testified that the December 4 tardy that resulted in his termination was attributable to his arrest. He testified that he was arrested on December 4 and was unable to appear for his 3:00 p.m. shift until 7:15 p.m. He testified that his son called Taber to say he was sick. Gaughf testified that Taber received the call less than thirty minutes before the beginning of McNeil's shift. McNeil supplemented the record to show that he was later found not guilty. McNeil argues that his absence due to an arrest was not intentional and, therefore, the absence could not support a finding of misconduct.

¶15. Excessive or unexcused absence from work may constitute misconduct and preclude unemployment benefits. *Barnett v. Mississippi Employment Security Commission*, 583 So. 2d 193,

196 (Miss. 1991); *Mississippi Employment Security Commission v. Martin*, 568 So.2d 725, 726 (Miss.1990); *BL Development Corp. v. Brantley*, 795 So.2d 611 (¶8) (Miss. Ct. App. 2001). In *Barnett*, the employer warned Barnett about excessive absences after Barnett was absent from work on fifteen occasions in four months. *Barnett*, 583 So. 2d at 195. The next month, a storm caused a tree to fall on Barnett's house and Barnett stayed home to arrange repair. *Id.* Barnett failed to notify the employer that he would be absent, despite his knowledge of the employer's policy requiring an employee to call before 7:00 a.m. if he was not going to come to work. *Id.* Barnett also failed to communicate his excuse for the absence to his employer upon his return to work. *Id.* Barnett was terminated and the MESC denied unemployment benefits because he had been discharged for misconduct connected with work. *Id.* at 194. The supreme court found that, as a matter of law, Barnett's actions could constitute misconduct because, after being warned, Barnett unreasonably failed to notify the employer that he would be absent. *Id.* at 196.

¶16. We find that McNeil's actions could constitute misconduct as a matter of law. McNeil exhibited a pattern of absenteeism without proper notification to the employer. On two occasions, McNeil was absent without calling Taber at least thirty minutes before he was supposed to be at work. McNeil testified that he knew and expected that points would be assessed to him for absences, and that he knew that Taber expected him to report absences at least thirty minutes prior to the start of his shift. Taber warned McNeil and later suspended him for his absenteeism. This shows that McNeil was on notice of Taber's disapproval of his absenteeism. On December 4, McNeil again failed to give Taber adequate notice that he would be four hours late for work due to the arrest. We observe that McNeil's record of prior absenteeism was wholly unconnected with the arrest. We find that McNeil's actions could constitute willful and wanton behavior in disregard of the employer's interest in employee attendance and thus, could constitute

misconduct as a matter of law. Additionally, we find that McNeil's record of absenteeism, in combination with his failure to notify Taber despite being warned, provided substantial evidence to support the MESC's finding that McNeil's actions constituted misconduct. *See Barnett*, 583 So. 2d at 196. This issue is without merit.[1]

III. WHETHER THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FAILING TO GIVE EFFECT TO AN ADMINISTRATIVE REGULATION.

¶17. The regulation McNeil bases this assignment of error upon states:

> An employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) *the rule is fairly and consistently enforced.*

M.E.S.C. Administrative Manual, Part V, Section 1720 (emphasis added). Taber's policies were that when an employee returned from an absence, his supervisor would fill out a form, stating among other things whether there was a reason to believe the FMLA would excuse the absence, and the form was sent to human resources, where points were assessed under the attendance policy. McNeil testified that supervisors "played favorites," and some supervisors choose not to fill out forms for some employees returning from absences. Therefore, McNeil argues that the attendance policy was not consistently enforced, and his termination could not be for misconduct.

¶18. No legal authority is cited for the proposition that an employer must adhere to a policy mechanically, absolutely and without exception. In fact, no such practice could exist, as is illustrated in this case. Gaughf testified that supervisors were required to exercise discretion. McNeil's own testimony was that he missed a day of work on one occasion when he was first transferred from shipping into the

[1] The record discloses that McNeil has a grievance avenue open to him through his union contract.

department where he worked until his termination. His supervisor did not report the absence, but McNeil did not question his supervisor about why the supervisor did not report the absence. Despite this one time occurrence, McNeil testified that he expected the policy to be consistently enforced against him. Given McNeil's testimony, the only conclusion that could be drawn was that there was no arbitrary enforcement of the regulation to prejudice McNeil, and the attendance policy was consistently enforced to give effect to its intended purpose of giving employees an understanding of the consequences of the policy. There is no merit to this assignment of error.

¶19. **THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS AFFIRMED.**

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, AND GRIFFIS, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING AND MYERS, JJ.

KING, P.J., DISSENTING:

¶20. I find myself forced to dissent to the majority opinion herein. The majority appears to have confused the issues of whether there existed an adequate basis to dismiss McNeil, and whether his actions constituted misconduct, such as would preclude his receipt of unemployment compensation benefits. There can be no doubt that Taber had grounds for the dismissal of McNeil. However, McNeil's actions were not misconduct so as to deny him unemployment compensation benefits.

¶21. The majority holds that, as a matter of law, McNeil had engaged in misconduct and was therefore not entitled to unemployment compensation. The majority ascribes as misconduct McNeil’s being absent or tardy for work several times within a period of twelve months.

¶22. Taber had a policy which assigned a specific number of penalty points to an employee each time he was tardy or missed work. These points were assigned without regard to the reason for the tardiness or absence. If an employee accumulated twelve points within twelve months, he was dismissed. McNeil received his twelfth penalty point when he was tardy for work on December 4, 2001. Because penalty points were assigned without regard to fault, McNeil was dismissed after having received his twelfth penalty point on December 4, 2001.

¶23. Following his dismissal, McNeil sought unemployment compensation benefits. In its statement to the MESC, Taber claimed that McNeil had been dismissed for misconduct, and therefore was not entitled to unemployment benefits.

¶24. After a hearing, the appeals referee issued a decision which denied unemployment compensation to McNeil. The relevant portion of that decision is as follows:

Findings of Fact

> The claimant was employed with Taber Extrusions, Gulfport, Mississippi, for approximately one year and five months as an Operator B, ending on December 5, 2001, when he was discharged for exceeding the employer's absentee points. At the time the claimant was separated, the employer had a written policy indicating that any accumulation of points in excess of twelve would lead to discharge. Also, the policy included a progressive disciplinary process. Prior to his separation, the claimant was administered three written warnings for attendance points, including two suspensions. At the time of each warning, the claimant was given a print-out of his point totals and was placed under advisement of what the following action would be if points continued to accrue. The employer's policy also includes a roll-over stipulation. Any time a point ages one year, it drops off. The claimant's points accumulated as follows: five absences totaling one point apiece; three no call absences totaling two points apiece; and one tardy whereby the claimant missed more than one-half of his scheduled work time, which added 1.5 points. The total reached 12.5 at the time the claimant was tardy on December 4, 2001. The claimant was late for work because he had been incarcerated earlier that morning. The claimant was scheduled to start work at 3:00 PM but he did not arrive until 7:00 PM. The claimant did not call to explain his situation to the employer. Consequently, the claimant was discharged on December 5, 2001.

Opinion

> Section 71-5-513A(1) (b) of the Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Commission, and for each week thereafter until he has earned remuneration for personal services equal to not less than eight (8) times his weekly benefit amount as determined in each case.
>
> In the Mississippi Supreme Court, in the case of Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982), the Court held that:
>
> "The meaning of the term 'misconduct', as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute."
>
> An employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced. (MESC Administrative Manual Part V, Paragraph 1720).
>
> The facts in this case show that the claimant was discharged for attendance. The evidence presented by the employer substantiates a finding that the claimant was made aware of policies and procedures, and was given opportunities to improve his behavior before he was discharged. An employer has the right to expect that an employee be at work, on time, and to give adequate notification if they are to be absent. The fact that the claimant failed to adhere to the employer's policies shows a willful violation of the standard of behavior that the employer has a right to expect. Consequently, the decision rendered by the claims examiner shall be modified as to the effective date of the disqualification period only.

¶25. When the referee made this decision, she did not have the benefit of knowing that McNeil was found not guilty of the charges against him. However, she did have the benefit of McNeil's testimony that he was a victim of ethnic profiling and had done nothing to cause his arrest.

¶26. McNeil appealed the decision of the referee to the Board of Review. Prior to disposition of this case by the Board of Review, McNeil was found not guilty of the charges against him. This information

was then provided to the Board of Review. The Board of Review chose to ignore this information, and adopted verbatim the findings and opinion of the referee, which denied benefits to McNeil.

¶27. The Harrison County Circuit Court likewise affirmed the denial of benefits to McNeil.

¶28. The majority opinion of this Court now proposes to do the same. The majority reaches that result by finding that McNeil was guilty of misconduct as a matter of law.

¶29. The majority uses *Barnett v. Mississippi Employment Security Commission*, 583 So. 2d 193 (Miss 1996) to support its holding that McNeil was guilty of misconduct as a matter of law. Such reliance suggests either the misreading or the misunderstanding of the *Barnett* decision. While it is true that *Barnett* says excessive absences may be misconduct, it does not make absenteeism misconduct as a matter of law, nor does it suggest that all absenteeism is misconduct. Instead, *Barnett* suggests that misconduct is a question of fact to be determined on a case by case basis.

¶30. This is readily seen by even a cursory reading of the following passage from *Barnett*:

> While no Mississippi cases so hold, it simply goes without saying that excessive absenteeism could constitute misconduct. *See, e.g., Barragan v. Williams Island*, 568 So.2d 106, 107 (Fla.Dist.Ct.App. 1990); *Tallahassee Hous. Auth. v. Florida Unemployment Appeals Comm'n*, 483 So.2d 413, 414 (Fla, Dist, Ct. App. 1986). This does not mean that excessive absenteeism would qualify as misconduct in all circumstances. *See, e.g., McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991) (frequent absences from work not misconduct when caused by inability to obtain child care for sick infant); *Gunderson v. Libby Glass*, 412 So.2d 656, 659 (La.Ct.App.1982) (absences resulted from reason beyond claimant's control).

Barnett v. Miss. Employment Sec. Comm'n, 583 So. 2d 193, 196 (Miss 1996).

¶31. When the foregoing passage is considered, it is clear that the majority's reliance upon *Barnett* is misplaced.

¶32. The definition of misconduct as frequently quoted is:

> Conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer . . .mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertence and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion [are] not considered "misconduct" within the meaning of the statute.

Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982).

¶33. The act that led to McNeil's dismissal was his arrest. The majority has failed to show any conduct on McNeil's part, resulting in his arrest, which evinces a willful and wanton disregard of his employer's interest. Likewise, the majority has not identified any act of recurring carelessness or negligence by McNeil which suggests an intentional or substantial disregard for his employer's interest. McNeil was doing what he was lawfully entitled to do in a manner in which he was lawfully entitled to do it, at a time when he was lawfully entitled to do it, and at a place at which he was lawfully entitled to do it.

¶34. Under these circumstances, I find incredible the majority's holding that McNeil has as a matter of law engaged in misconduct, which justified a denial of unemployment benefits.

¶35. While Taber's no fault policy provided a basis to dismiss McNeil, without some fault-based action, either direct or indirect, by McNeil, it did not provide a base for the denial of unemployment compensation benefits.

¶36. For these reasons, I would reverse and render.

IRVING AND MYERS, JJ., JOIN THIS SEPARATE OPINION.