

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00141 COA**

CITY OF CLINTON

APPELLANT

v.

**MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION & LLOYCE F. AINSWORTH**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/02/96
TRIAL JUDGE:	HON. ROBERT GIBBS
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	CAROLYN MILLS KENNETH DREHER
ATTORNEY FOR APPELLEES:	ALBERT WHITE
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	CITY EMPLOYEE'S UNEMPLOYMENT BENEFITS UPHELD
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE McMILLIN, P.J., DIAZ, AND HERRING, JJ.

DIAZ, J., FOR THE COURT:

Lloyce Ainsworth was employed for ten and one-half years as a fireman for the City of Clinton. He was terminated for misconduct and filed for unemployment benefits, which were denied. The claims examiner denied Ainsworth benefits on the ground that he was discharged for misconduct connected with work. The referee for the Mississippi Employment Security Commission reversed the claims examiner's decision and held that the employer had not met his burden of proving by substantial clear and convincing evidence that Ainsworth was guilty of misconduct. The Board of Review upheld this decision, and it was appealed to the Hinds County Circuit Court, who affirmed. We likewise affirm.

FACTS

Ainsworth attended a public meeting of the Mayor and the Board of Aldermen for the City of Clinton. Prior to the 7:00 p.m. start of the meeting, Ainsworth and his family arrived. Ainsworth had asked a family friend to serve summons on the mayor. When service was made on the mayor, Ainsworth stood, folded his arms, and turned to leave. Two aldermen alleged that Ainsworth made an obscene gesture when he stood to go. The aldermen reported the gesture to the mayor, and subsequently, Ainsworth was terminated for misconduct. Ainsworth denies that he made any type of gesture whatsoever. Ainsworth contends that his arm was sore and hurting him, so he grabbed his arm and then folded them. The City of Clinton now appeals the award of benefits.

ISSUE

WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT THE EMPLOYER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT LLOYCE AINSWORTH WAS TERMINATED FOR MISCONDUCT AND THAT HE SHOULD BE DENIED UNEMPLOYMENT BENEFITS

Ainsworth was denied unemployment benefits under **Mississippi Code Annotated Section 71-5-513 A (1) (b) (Rev. 1995)**. The standard of review for this type of ruling was stated in *Shannon Eng'g. & Constr. Inc. v. Employment Sec. Comm'n*, 549 So. 2d 446, 449 (Miss. 1989):

At any judicial proceedings. . . the findings of the board. . . as to facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.

Therefore, this Court is without authority to disturb the findings of the Board where there was substantial evidence to support its findings. The appeals court must not re-weigh the facts nor insert its judgment for that of the agency. *Allen v. Mississippi Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994).

The question is whether there was substantial evidence for the Board to hold that there was no misconduct by Ainsworth. The term misconduct, as used in the unemployment compensation statute, is defined as:

conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard standards of behavior which the employer has the right to expect from his employee. 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).

Intent is an essential element of misconduct and was not present in the case before us. There was no

substantial evidence that Ainsworth intended an obscene gesture when he folded his arms. Ainsworth had no past misconduct on his record for the ten and one-half years of employment with the city, and there was no evidence as to any dispute between Ainsworth and the mayor or any aldermen. The only two witnesses in the room testified to different gestures allegedly made by Ainsworth. Neither witness saw Ainsworth make the same exact gesture-- they both interpreted his movements differently. Therefore, either or both aldermen could also have misinterpreted the gestures made by Ainsworth.

The burden to prove misconduct is on the employer. The Board found that the employer had not met its burden because there was not sufficient evidence to support a finding that Ainsworth was guilty of misconduct. We hold that the ruling of the Board was not arbitrary and capricious and there was substantial evidence to support its finding.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY AFFIRMING THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION'S GRANT OF UNEMPLOYMENT BENEFITS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE CITY OF CLINTON.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.