

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00580 COA

ROSE L. PARKER

APPELLANT

v.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEYS FOR APPELLANT:

JEREMY EISLER

JOHN C. JOPLING

ATTORNEY FOR APPELLEE:

ALBERT B. WHITE

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: DENIED BENEFITS

MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is an appeal from an order of the Circuit Court of Harrison County, rendered on April 23, 1996, in which the court affirmed the decision of the Board of Review of the Mississippi Employment Security Commission (MESC) denying unemployment benefits to Rose L. Parker. We find that the Board of Review's decision was supported by substantial evidence and was not arbitrary and capricious. We affirm the judgment of the circuit court denying benefits.

Parker filed for unemployment benefits on June 7, 1995. On June 9, 1995, the claims examiner issued a "Notice of Nonmonetary Decision" disqualifying Parker for unemployment benefits. Parker filed an appeal from the denial and a hearing was held before Appeals Referee Cindy C. Gill. In a decision dated July 6, 1995, the referee reversed the decision of the claims examiner, holding that the evidence presented at the hearing did not support a finding of "misconduct" under Mississippi law. On July 17, 1995, Appellee, Treasure Bay Casino, filed an appeal and in a decision dated August 28, 1995, the Board of Review reversed the appeals referee, disqualifying Parker from receiving benefits. Parker then appealed to the Circuit Court of Harrison County on September 5, 1995, and Circuit Court Judge Kosta N. Vlahos, entered an order on April 23, 1996, affirming the decision of the Board of Review.

## FACTS

Parker was employed by Treasure Bay Casino as a hostess/cashier for thirteen months prior to her discharge on May 26, 1995. According to Treasure Bay Casino, Parker was discharged because she failed to report to work on May 22 and May 23 as scheduled and did not notify her supervisor that she would be absent as is required by company policy. The employer also indicated that they had encountered previous misconduct by Parker. In 1994, Parker received four written warnings for customer complaints of rudeness, insubordination, and cash shortages. In 1995, prior to her termination, Parker received one verbal warning for arguing with a guest and received a three day suspension for insubordination.

During her employment with Treasure Bay Casino, Parker was under the care of a physician and was being treated for an anxiety disorder and a seizure disorder. The treatment for these disorders included daily doses of prescription medications such as Xanax, Phenobarbital, and Dilantin. Parker testified at the hearing that she failed to show up for work on May 22 and 23 because she did not realize that she was scheduled to work on those days. Parker explained that she had swapped shifts on May 21 with another employee and was working the 3:00 p.m. to 11:00 p.m. shift, instead of her normal 8:00 a.m. to 3:00 p.m. shift. Parker indicated that the shift had been extremely busy and she was unable to take a break in which to eat and take her medication. Parker stated that at the end of her shift, she "felt the effects of a seizure coming on" and was experiencing symptoms of listlessness, confusion, and exhaustion. Parker testified that, because of these symptoms, she left the casino immediately following her shift and therefore, failed to check the schedule. Parker indicated that she believed May 22 (Monday) and 23 (Tuesday) were her days off because she had been off on Monday and Tuesday during the previous week. Parker stated that had she known that she was scheduled to work on those two days, she would have been there. Parker did report to work on Wednesday, May 24, 1995, but was sent home with instructions to call the casino on Friday to find out if she would be allowed to return to work. On Friday, May 26, 1995, Parker was notified that she had been

discharged for failing to report to work as scheduled.

Parker testified at the hearing that her employer was aware of her medical condition and knew that she needed regular breaks in order to eat and take her medication. Parker also indicated that the casino was not consistently enforcing its policies, as she was aware of at least three other employees who had failed to report to work or call in their absence but were allowed to continue working. Aggrieved by the decision of the circuit court, Parker raises the following three issues on appeal: (1) As a matter of law, an employer fails to meet its burden of proving misconduct where the employer fails to rebut credible evidence of incapacity, (2) An isolated occurrence of inadvertent absenteeism is insufficient, as a matter of law, to support a finding of disqualifying misconduct under Mississippi Employment Security Law, (3) An employee cannot be found guilty of disqualifying misconduct for violating a rule that is not fairly or consistently enforced as required by MESC regulation.

### ANALYSIS

Under Mississippi's Unemployment Compensation Law, a person is disqualified from receiving benefits if he is discharged from employment for misconduct connected with his work. Miss. Code Ann. 71-5-513(A)(1)(b) (Rev. 1995). The Mississippi Supreme Court has defined the term "misconduct" as "conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee." *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). Conversely, "misconduct" does not include: "[m]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertencies and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion . . . ." *Id.*

Section 71-5-531 of the Mississippi Code sets forth the parameters of the judicial review of board of review findings. Section 71-5-531 reads in part: "In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." Miss. Code Ann. 71-5-531 (Rev. 1995).

The Mississippi Supreme Court explained this standard of review in *Allen v. Mississippi Employment Security Commission*:

This Court's standard of review of an administrative agency's findings and decisions is well established. An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise. Lastly, this Court must not reweigh the facts of the case or insert its judgment for that of the agency.

*Allen v. Mississippi Employ. Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994) (citations omitted). Additionally, an employer has the burden of proving disqualifying misconduct by substantial, clear and convincing evidence. *Mississippi Employ. Sec. Comm'n v. McLane-Southern, Inc.*, 583 So. 2d 626, 628 (Miss. 1991).

In the present case, Parker argues that her failure to check the schedule was due to an incapacity resulting from her medical condition of which the employer had knowledge. Parker contends that incapacity is specifically excluded from the definition of misconduct as set forth in *Wheeler*, 408 So. 2d at 1383. Parker argues that she provided compelling evidence, corroborated by her physician, which supports her explanation of her failure to double-check her schedule. Parker argues that the casino failed to rebut this explanation and therefore, did not meet its burden of proving disqualifying misconduct by substantial, clear, and convincing evidence.

Notwithstanding her incapacity, Parker argues further that one occurrence of inadvertent absenteeism is insufficient to constitute misconduct under Mississippi law. Parker contends that the *Wheeler* court expressly excluded "inadvertencies" and "ordinary negligence in isolated instances" from its definition of misconduct. *Id.*

Finally, Parker argues that her employer's "no show/no call" policy has been inconsistently enforced which is a direct violation of MESC Regulation 1720 of the Administrative Manual which states in pertinent part:

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.

Parker claims that she is aware of three other employees who violated the casino's "no show/no call" policy and were not discharged. During her hearing before the appeals referee, Parker submitted an affidavit from a former employee which stated that he had violated the "no show/no call" policy and was allowed to continue working. Parker contends that the casino's failure to dispute this evidence and its admission that Treasure Bay has been inconsistent in its application of the "no show/no call" policy entitles her to unemployment benefits.

While Parker may be correct in her assertion that one occurrence of inadvertent absenteeism or incapacity is not sufficient to constitute misconduct, we find that there was substantial evidence of a course of misconduct which is sufficient to support the decision by the MESC Board of Review.

It appears that Parker's failure to report to work on May 21 and 22 of 1995 was, if you will, "the straw that broke the camel's back." Treasure Bay provided substantial evidence of previous occurrences of misconduct which Parker does little to dispute. Keeping in mind our limited scope of review, we do not find the decision of the Board of Review to be unsupported by substantial evidence nor do we find the decision to be arbitrary and capricious. As for Parker's claim that her employer was inconsistent in the application of its policies, it would appear that the Board of Review gave little weight to Parker's proof of inconsistency or, more likely, the board distinguished this case from the ordinary "no show/no call" violation due to Parker's course of misconduct leading up to her unauthorized absences. Either way, the Commission's decision was supported by substantial evidence, and we find no need for reversal. We therefore affirm the decision of the circuit court.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED. ALL**

**COSTS OF THIS APPEAL ARE ASSESSED TO THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**