

IN THE COURT OF APPEALS 11/28/95

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00250 COA

WILBERT HOUSETON

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. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

BEVERLY D. POOLE

ATTORNEY FOR APPELLEES:

FRED J. LOTTERHOS

NATURE OF THE CASE: UNEMPLOYMENT COMPENSATION

TRIAL COURT DISPOSITION: AFFIRMED FINDING THAT HOUSETON'S MISCONDUCT
PREVENTED HIM FROM RECEIVING UNEMPLOYMENT COMPENSATION

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Wilbert Houseton (Houseton) filed a claim for unemployment compensation. The Mississippi Employment Security Commission (MESC) denied benefits and the Hinds County Circuit Court affirmed. Houseton appeals only the sufficiency of the evidence to support the decision that his actions constituted misconduct. Since there is substantial evidence in the record to support MESC's finding that Houseton's actions constitute misconduct, we affirm.

FACTS

In late 1993, Coca-Cola sponsored a promotional contest "Monsters of the Gridiron" (contest). Purchasers of Coca-Cola products who found winning markings inside of bottle caps of Coca-Cola products were permitted to exchange the caps for free Coca-Cola products at participating stores. The contest ended in October 1993 and some of the unsold bottles of Coca-Cola product with the contest packaging were returned to Coca-Cola to be destroyed.

Houseton was employed as a warehouse worker for the Jackson Coca-Cola Bottling Company (Coca-Cola) in 1993. One of Houseton's duties was destroying and discarding damaged or returned out of date Coca-Cola bottles. In late March and early April of 1994 Houseton removed approximately thirty-seven winning bottle caps over a four week period from returned stock. He exchanged the caps for free bottles of Coca-Cola soft drinks at a participating store in Florence, Mississippi on numerous occasions during the four week period. The manager of the store in Florence was suspicious of Houseton because he appeared with the winning caps several months after the contest had terminated, submitted the caps in groups of six, and wore a Coca-Cola uniform. Therefore, the manager contacted Coca-Cola.

After the manager identified a photograph of Houseton his supervisor asked him if he had redeemed 37 bottle caps at the store in Florence. Houseton responded that he had redeemed the bottle caps but the caps he redeemed were from bottles he had personally purchased. The supervisor then asked if he knew that the contest stock had not been on sale since the end of October, five months previous, and that winning bottle caps were placed in every thirty-second bottle. Houseton admitted he did not know that information and confessed that he had taken the winning caps from returned stock. Houseton was suspended for two days without pay while Coca-Cola further investigated the incident. His employment was terminated on April 28, 1994 for removal of company property from employment premises without permission pursuant to Coca-Cola's stated policy.

The Coca-Cola employees handbook reads as follows:

TERMINATION

A termination offense carries the penalty of immediate termination of employment.

....

7. Removal from the company's premises without permission property belonging to the Company or another employee.

Further, each employee received a January 1991 memorandum with his paycheck which read:

There may be some misunderstanding about our policy regarding removal of company property from these premises without authorization. Jackson Coca-Cola prohibits the removal of any property from the premises without securing approval of a supervisor prior to doing so. There are no exceptions. This includes, but is not limited to, tools, equipment, inventory or *discarded items of any kind*. *In other words, if you wish to remove anything from these premises other than your own personal property, you should see your supervisor before doing so.* If you have any questions about this clarification, please contact your supervisor or Helen Prestrige in the Personnel Department.

Houseton admitted receiving these documents.

Following dismissal, Houseton filed a claim for unemployment benefits with the MESC and the claims examiner disallowed the claim. Houseton protested his eligibility for benefits, alleging that he was not discharged for misconduct connected with his work. The MESC referee determined that Houseton's actions constituted misconduct and affirmed the decision of the claims examiner disallowing unemployment benefits. Houseton appealed to the MESC Board of Review, which adopted the referee's findings of fact and affirmed his decision. Houseton appealed to the Hinds County Circuit Court. The Hinds County Circuit Court affirmed the MESC Board of Review.

The MESC Referee made the following findings of fact and conclusions of law:

The claimant was employed with Jackson Coca[-]Cola Company, Jackson, MS, for seventeen years as a warehouse worker, last working on April 26, 1994. On or about that day it was discovered that the claimant had been taking drink caps from bottles, to be discarded on a promotion that had ended in October, 1993, and the claimant was redeeming these bottle caps for free drinks at a local supermarket. The company hand book and other company communication clearly indicates such property or discarded items of any kind, to be the property of Jackson Coca[-]Cola Bottling Company and should not be removed from the premises. A violation of such policy is grounds for discharge. The claimant was suspended as of his last day of work discharged on April 28, 1994, for violation of this policy.

....

It is the opinion of the Referee that the claimant was discharged for theft of property from the company. The claimant was aware that the merchandise that he was taking was to be destroyed at the company, and the claimant had been given no other authorization to take the merchandise for his own personal gain. Therefore, it is concluded that the claimant's action was both willful and wanton and in disregard of the employer's interest and company policies. The Claims Examiner's decision is ordered.

DISCUSSION

DID THE CIRCUIT COURT ERR IN AFFIRMING THE MESCS DENIAL OF UNEMPLOYMENT BENEFITS BASED ON THE HOLDING THAT HOUSTON'S ACTIONS CONSTITUTE MISCONDUCT?

Our standard of review is well established:

Judicial review of an Employment Security Commission ruling is limited to determination of whether the decision is supported by substantial evidence. This Court must review the record to determine whether there is substantial evidence to support the Board of Review's findings of fact, and further, whether, as a matter of law, the employee's actions constituted misconduct disqualifying him from eligibility for unemployment compensation benefits.

Foster v. Mississippi Employment Sec. Comm'n, 632 So. 2d 926, 927 (Miss. 1994) (citations omitted). Additionally, this Court must not reweigh the facts of the case or insert its judgment for that of the agency. *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So. 2d 901, 902 (Miss. 1994) (citations omitted). The burden of proving disqualifying misconduct by clear and convincing evidence rests with the employer. *Id.* at 903.

Mississippi law provides "that an individual may be disqualified for unemployment benefits if he was discharged 'for misconduct connected with his work'" *Foster*, 632 So. 2d at 927 (citing Miss. Code Ann. § 71-5-513(A)(1)(b) (1972)). The Mississippi Supreme Court has defined 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." *Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 425 (Miss. 1991).

The referee's findings of fact and opinion, adopted by the full commission, are supported by substantial evidence. Houston admittedly willfully violated his employer's policy and admonitions in

wrongfully taking the winning bottle caps and appropriating them to his own use. Under well established law his actions constituted misconduct connected with his work and we are without authority to disturb the findings and order of the commission affirmed by the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY AFFIRMING THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.