

**IN THE COURT OF APPEALS 08/15/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-CC-00968 COA**

**JERRY J. WOODS APPELLANT**

**v.**

**MISSISSIPPI EMPLOYMENT SECURITY**

**COMMISSION AND BORDEN FOOD SERVICE APPELLEES**

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

TRIAL JUDGE: HON. L. BRELAND HILBURN, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): PAUL E. ROGERS

ATTORNEY(S) FOR APPELLEE(S): PATRICK M. TATUM

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: DENIED BENEFITS

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

COLEMAN, J., FOR THE COURT:

This is an appeal from an order of the Circuit Court of the First Judicial District of Hinds County rendered on September 9, 1994 in which that court affirmed the Mississippi Employment Security Commission's denial of employment benefits to Jerry J. Woods. We affirm that order.

**I. Facts and Administrative Procedure**

Woods had worked for Borden Food Service (Borden) from February 27, 1991 until December 10, 1992, a period of more than one year and eight months. After Borden terminated his employment on the latter date, he applied for unemployment benefits with the Mississippi Employment Security Commission. In the nonmonetary report of investigation made for the Commission, Connie Woods, the Employee Relations Representative for Borden, stated that Woods had been discharged for insubordination. She elaborated:

It was his responsibility to remove excess water from his workstation before leaving for the day. He failed to do this, and his supervisor told him that he needed to do it before he left. Since he did not follow his instructions as directed, he was terminated.

In this same nonmonetary report of investigation, Woods' version of this episode was that he was asked to do this after 6:00 a.m. which was time for him to go home. Borden did not pay overtime, so he did not feel that he had to do it. Instead, he "clocked out" and went home.

On December 29, 1992, the Claims Adjuster denied Woods' claim for unemployment benefits because she determined that Woods had been "discharged for misconduct connected with [his] work." Woods filed his Notice of Appeal to Appeals Referee on December 31, 1992 pursuant to which an Appeals Referee conducted a hearing on Tuesday, February 9, 1993. At this hearing, the employer, Borden, was represented by the same Connie Woods who testified that Borden had specific rules of conduct for its employees. These rules were stated on page 17 of the Borden Employee Handbook, a copy of which Borden gave to each of its employees when the employee began working for it. A copy of page 17 of this employee's handbook was introduced into evidence as Employer's Exhibit "2" without objection from claimant Woods. We quote from page 17:

Borden employees are expected to conform to generally accepted business standards of behavior. These standards apply whenever employees are engaged in their employment activities. . . .

Some examples of conduct considered to violate these standards and constituting grounds for immediate termination are:

. . . .

#### 15. Insubordination or refusal to work.

Claimant received a copy of this employee's handbook on February 27, 1991, as is evidenced by a Receipt for Employee Handbook signed by Woods on that date, a copy of which was introduced into evidence as Employer's Exhibit "3" without objection from Woods. We quote from the text of that Receipt:

I, Jerry Woods, have received and agree to read the Borden Employee Handbook.

If any questions still remain unanswered, I understand that I am free to consult with my Supervisor and/or the Personnel Representative for assistance in obtaining these answers.

Signed: S/ Jerry J. Woods

Date: 2/27/91

At the hearing, Connie L. Woods stated that Woods had been fired for insubordination, which she described as follows:

On December the third, [Woods] was reminded by his supervisor, Mr. Sullivan, to perform a part of his normal job function which was to squeegee the floor of excess water in part of his work area. Just before . . . 6:00, Mr. Sullivan instructed him to return to his work area and do this particular task. The discussion carried on until approximately 6:00 at which time I was told Mr. Woods stated that it was 6:00; it was time to clock out; he did so and left the premises.

Woods added that squeegeeing the water in this particular area was "a normal function of [Woods'] position."

Demitri Sullivan, Woods' supervisor, testified that he normally checked work areas sometime before six o'clock. He walked through Woods' work area about "ten till six" and found water on the floor. He tried to find Woods so that he could instruct him to squeegee the water from the floor. When Sullivan walked "out in front by the time clock" and began talking to some people, he "looked up and . . . saw [Woods] coming from the front area . . . walking toward the time clock. He told Woods, "You need to get get the water up in your work area before you leave. . . ." According to Sullivan, Woods looked at him; a couple of people began to check out; and Woods looked at the time clock and said, "It's six. I'm going home." Whereupon Woods punched out and left. In response to the Hearing Referee's query, Sullivan stated that he thought that Woods could have squeegeed away the water in approximately three minutes and that Woods would have been paid overtime for working after six o'clock. Sullivan told the Appeals Referee that he and Woods had had "several discussions about job duties in which things that I considered his duty and things he didn't consider that was [sic] his duties, job, regular job duties."

Neil Hillstrum, Borden's production manager, testified that it was important to remove the water because it was located in a traffic area where people came in and out of the room. Thus, the presence of the water constituted a "safety hazard."

Woods testified that when he returned to work at 10:00 p.m. on December 3 he was told to go home. He also testified that he had left the work area at approximately 5:55 that morning to put up his gear

in his locker on his way to "clock out." Woods explained his failure to return to his work area to remove the water because it was after six when Sullivan directed him to do it and because he had not been paid overtime on previous occasions when he had clocked out "three, four minutes late."

On February 12, 1993, the Appeals Referee rendered his findings of fact, which were as follows:

Claimant was employed with Borden Food Services, Jackson, Mississippi, for one and one-half years as a factory worker, last working on December 3, 1992. On this date, claimant was instructed by his supervisor, Demetri Sullivan, to clean up water that was on the floor in his work area. Claimant made no reply to Mr. Sullivan and stated that it was 6:00 a.m. which was time to leave and he clocked out and left the building. Claimant was aware that he was to clean up the water in his work area nightly. The task would have taken approximately three to four minutes to complete.

The Appeals Referee concluded from his findings of fact that what Woods' actions constituted insubordination and that "[I]nsubordination does constitute misconduct connected with the work as that term is defined in the law." Thus, "The Claims Examiner's decision is in order." Woods then filed a Notice of Appeal to Board of Review which the Commission received on February 23, 1993 pursuant to which appeal the Board of Review adopted the findings of fact and opinion of the Referee and affirmed his decision. Woods next appealed the Commission's denial of benefits to the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the 21st day of April, 1993; and, as we previously noted, that court on September 9, 1994 entered its final order in which it found that "the decision of the Board of Review of the Mississippi Employment Security Commission was correct to law and said decision is affirmed . . . ."

## **II. Issues**

In his brief, Woods presents this one issue for this court's determination:

Whether Appellant's conduct constitutes misconduct connected with his work as defined by the Mississippi Supreme Court so that he should be disqualified from receiving unemployment benefits?

Section 71-5-31 of the Mississippi Code in pertinent part provides the standard of review for this Court:

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. § 71-5-31 (1972); *see also Mississippi Employment Sec. Comm'n. v. Percy*, 641 So. 2d 1172, 1174 (Miss. 1994). We interpret this section to require that we affirm the Commission's

Board of Review if its findings of fact are supported by substantial evidence and if we further determine that it had not misapplied the law to its findings of fact.

More recently, this State's Supreme Court decided an appeal from the Mississippi Employment Security Commission in which it applied the following standard of review:

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 Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994) (citations omitted). A comparison of this latter standard of review, which appears to be the generic standard of review for the Mississippi Supreme Court's consideration of appeals from all of Mississippi's administrative agencies with the standard of review which the legislature specifically prescribed for appeals from the Mississippi Employment Security Commission in Section 71-5-31 of the Mississippi Code, leads to the conclusion that while the "Section 71-5-31" standard of review for MESC appeals remains subordinate to the "generic" standard of review quoted in *Allen*, the "Section 71-5-31" standard of review is the appropriate initial standard of review for this Court to employ when it engages in the resolution of issues which confront it in appeals from the MESC.

First of all, we conclude that the Hearing Referee's findings of fact, which we previously quoted, were indeed supported by the evidence, which we have previously related. We next consider whether the Commission through its Board of Review correctly applied the law to the facts which the Appeals Referee found. The legal issue in this case is whether Woods' single refusal to remove the water on the floor in his work area constituted misconduct" within the meaning of Section 71-5-513(A)(1)(b) of the Mississippi Code of 1972 (Supp. 1994). The Mississippi Supreme Court has defined misconduct as:

[C]onduct 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. 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.

*Shannon Eng'g & Constr. v. Mississippi Employment Sec. Comm'n*, 549 So. 2d 446, 448-449 (Miss. 1989).

In his brief, Woods relies on several cases by which he seeks to persuade this Court that his one act of refusing to squeegee away the water on the floor in his work area did not constitute misconduct. He points out that in *Shannon Eng'g & Constr. v. Mississippi Employment Sec. Comm'n*, 549 So. 2d 446 (Miss. 1989), the employee refused to sign a form that he was not allowed to read. *Id.* at 447-48. The Court affirmed the circuit court's opinion that "Barry was merely standing up for his rights because he believed that Shannon was trying to take advantage of him." *Id.* at 450. He notes that in *Mississippi Employment Sec. Comm'n v. McLane-Southern, Inc.*, 583 So. 2d 626 (Miss. 1991), an employee was involved in a fight on the employer's premises. *Id.* at 627. The Court held that one action standing alone did not constitute misconduct sufficient to deny benefits. *Id.* at 628-29. Finally, he emphasized that in *Gore v. Mississippi Employment Security Commission*, 592 So. 2d 1008 (Miss. 1992), Gore was told not to discuss raises with fellow employees. *Id.* at 1009-10. Gore was fired when it was discovered she was doing just that. *Id.* The Mississippi Supreme Court held that her action was insufficient to prove insubordination since no constant or continual refusal to obey an order of an employer existed. *Id.* at 1010. This isolated incident was insufficient to disqualify her from unemployment compensation. *Id.*

In *Shannon Engineering*, the Mississippi Supreme Court noted that the issue of whether "insubordination" fell within the purview of "misconduct," with regard to unemployment compensation cases, "had not been legislatively nor judicially addressed in this state." *Shannon Eng'g*, 549 So. 2d at 449. It then referred to the case of *Sims v. Bd. of Trustees, Holly Springs Mun. Separate Sch. Dist.*, 414 So. 2d 431 (Miss. 1982) in which a teacher was dismissed for insubordination because she refused to execute an attachment to her contract of employment in which the court defined insubordination as a "constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority." *Sims*, 414 So. 2d at 435. The court then held that the *Sims* definition of insubordination should be extended to unemployment cases and that insubordination was included within the scope of "misconduct." *Shannon Eng'g*, 549 So. 2d at 449.

Woods' argument urges us to forgive his refusing to remove the water from the floor because according to the definition of insubordination extended by the Supreme Court in *Shannon Engineering*, the insubordination must be a "constant or continuing intentional refusal to obey a direct or implied order." However, we think that even under Appellant's argument, the evidence supports the Hearing Referee's factual finding that Woods was insubordinate when he refused to return to his work area at quitting time to "squeegee" away the water for the following reasons:

1. Keeping the floor clear of water was a part of his "job description" for which he was responsible.
2. Sullivan, his supervisor, testified that he and Woods had had several conversations about Woods' job performance, the subjects of which were matters that Sullivan thought Woods ought to do but with which Woods disagreed.

Moreover, the evidence clearly shows that Woods had acknowledged his receipt of a Borden Employee Handbook, in which he was notified that his insubordination was a ground for the termination of his employment. Aside from whether Woods' refusal at or near quitting time to remove the water from the floor per his supervisor's order constituted insubordination, this Court finds that his failure to maintain the floor in a dry condition "evinced . . . willful and wanton disregard of [his] employer's interest [in] disregard of standards of behavior which the employer ha[d] a right to expect from hi[m]." His failure to remove the water from an area used by other employees for access to and from the room for which Woods was responsible, created a safety hazard about which Neil Hillstrum, Borden's safety manager, testified. This safety hazard was surely "showing an intentional or substantial disregard of the employer's interest" by Woods.

For the foregoing reasons, we find that the Appeals Referee correctly applied the law to the findings of fact which he made, which findings of fact we have previously reviewed and found to be supported by substantial evidence. Therefore, consistent with our interpretation of Section 71-5-531 of the Mississippi Code (1972), which establishes our standard of review, we affirm the order of the Circuit Court of the First Judicial District of Hinds County, Mississippi dated September 9, 1994 by which that court affirmed the Commission's denial of Woods' unemployment benefits.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY WHICH AFFIRMED THE COMMISSION'S DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS IS AFFIRMED. COSTS ARE ASSESSED TO THE COMMISSION.**

**FRAISER, C.J., BRIDGES, P.J., McMILLIN AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., BARBER, DIAZ AND KING, JJ.**

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PAYNE, J., DISSENTING:

I respectfully dissent. For insubordination to meet the definition of "misconduct" and to disqualify one from unemployment compensation benefits, it must be "a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority." *Shannon Eng'g & Constr., Inc. v. Mississippi Employ. Sec. Comm'n*, 549 So. 2d 446, 449 (Miss. 1989) (citations omitted); *see also Gore v. Mississippi Employ. Sec. Comm'n*, 592 So. 2d 1008, 1009 (Miss. 1992). In *Shannon Eng'g*, the employee refused to sign a form that he was not allowed to read. *Id.* at 447-48. The Mississippi Supreme Court affirmed the circuit court's opinion that "Barry was merely standing up for his rights because he believed that Shannon was trying to take advantage of him." *Id.* at 450. In the present case, Woods testified that he had been responsible for two work areas and that he had already mopped the area in question before going on to the next one. He further testified that low spots in the floor and an upstairs leak caused water to collect again right after mopping. The *Shannon Eng'g* definition of misconduct, which also disqualifies an employee from unemployment compensation benefits, simply does not apply to Woods: the record shows he left work at his appointed time; he testified that he was concerned at the time that he might not get paid for any extra time worked since he stated that he had previously worked overtime without getting paid; he had had a conversational disagreement with his supervisor early that shift regarding possibly not getting paid for taking vacation without filing a proper vacation form; and he was expected to work overtime (very likely without pay) to clean up what he stated was a recurring leakage problem that he could not fix himself. Woods' leaving work on this occasion may have been weak grounds for termination, but admittedly the grounds were made stronger under the employee handbook rules with which he was charged. However, his conduct was certainly not grounds for denial of unemployment benefits under the term "misconduct," particularly since his refusal to clean up the water was not "constant or continual" and since Borden's order was not "reasonable in nature." Is asking an employee to work overtime to clean up a recurring problem that the employee cannot fix, along with no assurance of overtime payment, "reasonable in nature?" My conviction is that it most likely is not. Moreover, is this same employer request "trying to take advantage of [the employee]?" I believe that could very well be the case.

Although our review may be limited on appeal, *an employer* has the burden of proving disqualifying misconduct by substantial, clear, and convincing evidence in order that we uphold a lower court decision. *Mississippi Employ. Sec. Comm'n v. McLane-Southern, Inc.*, 583 So. 2d 626, 628 (Miss. 1991) (citation omitted). Acts of an employee that may warrant termination of employment do not necessarily rise to the level of misconduct to disqualify that employee from unemployment compensation. *Allen v. Mississippi Employ. Sec. Comm'n*, 639 So. 2d 904, 907-08 (Miss. 1994) (inefficiency, unsatisfactory conduct, inept performance, or good faith errors in judgment or discretion are not considered misconduct within the statute); *see also Mississippi Employ. Sec. Comm'n v. Phillips*, 562 So. 2d 115, 118 (Miss. 1990) ("Misconduct imports conduct that reasonable and fair-minded external observers would consider a wanton disregard of the employer's legitimate interests.").

In *McLane-Southern, Inc.*, an employee was involved in a fight on the employer's premises. *McLane-Southern, Inc.*, 583 So. 2d at 627. The Court held that one action standing alone did not constitute misconduct sufficient to deny benefits. *Id.* at 628-29. In *Gore*, the employee Gore was told not to discuss raises with fellow employees. *Gore*, 592 So. 2d at 1009-10. Gore was fired when it was discovered she was doing just that. *Id.* The Court held that her action was insufficient to prove insubordination since no constant or continual refusal to obey an order of an employer existed. *Id.* at 1010. This isolated incident was insufficient to disqualify her from unemployment compensation. *Id.* In the present case, Woods had worked at Borden for a year and nine months without incident. His refusal to mop up water in a certain work area likewise comprised a single, isolated incident. This incident was certainly not a constant or continuing refusal to obey Borden's order. Most importantly, the incident falls far short of insubordination as grounds for misconduct that requires denial of unemployment compensation benefits.

Although Borden correctly claims that water on the floor was a safety-related issue, Woods testified that he had left water on the floor on previous occasions with no concern shown by Borden. Borden produced no evidence of any previous problem, discussion, or write-up of Woods' failure to follow orders. Borden testified that it was significantly down-sizing at the time, but that Woods had been on its list of employees to be retained. These two facts, independently or in conjunction, point to the conclusion that this was an isolated event involving an employee with no previous record of an employment problem at Borden and whom Borden was planning to keep during a period of layoffs of other employees.

Borden seems to make much of the fact that the requested work would not have taken three or four minutes to complete. However, Borden also seems to believe that such a minor job was major enough to constitute insubordination and a cause for dismissal. I agree with Borden that *Shannon Eng's* gives the correct definition of insubordination. However, I do not agree that one isolated instance of refusal to do a three-minute task meets that definition for purposes of denying unemployment compensation benefits. Likewise, I do not agree that an isolated instance is made a constant and continuous refusal by leaving the premises and not returning to do the task. This is not an attempt to reweigh the facts or to insert another judgment for that of the referee. However, it is a firm conviction that the referee's decision of terming Woods' conduct "misconduct," as defined by Mississippi case law, is not supported by substantial evidence.

Here, Borden has failed to prove by substantial, clear, and convincing evidence that Woods was guilty of insubordination. Nothing in the evidence proves that Woods was committing a constant or continuing refusal to obey an order, but only that Woods was guilty of an isolated incident by not complying with Borden's order. Woods simply chose not to redo a task after the end of his workday. The referee's decision was not properly based on substantial evidence of a wanton disregard of Borden's interest necessary to deny Woods unemployment compensation benefits. Woods' refusal to clean up the water may have been an error in judgment, but it failed to rise to the level of misconduct as the Mississippi Supreme Court has defined it in unemployment compensation cases. I believe the MESC's conclusions were not supported by substantial evidence and should be reversed.

For the reasons stated herein, I would reverse the decision of the trial court and grant Woods unemployment compensation benefits.

**THOMAS, P.J., BARBER, DIAZ AND KING, JJ., CONCUR WITH THIS OPINION.**