IN THE COURT OF APPEALS 07/18/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00695 COA

JAMES B. WILSON APPELLANT

v.

JESCO, INC. APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. THOMAS J. GARDNER, III

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): LUTHER C. FISHER, IV

ATTORNEY(S) FOR APPELLEE(S): DAVID R. SPARKS

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: DENIED UNEMPLOYMENT BENEFITS

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

PAYNE, J., FOR THE COURT:

The procedural history of this case involves a series of decision reversals. James Wilson was terminated from his employment with Jesco and immediately filed for unemployment benefits. The Mississippi Employment Security Commission (MESC) initially denied benefits. Wilson appealed and an MESC appeals referee reversed the initial decision and granted him unemployment benefits. Jesco appealed to the MESC Board of Review, which affirmed the referee's decision to grant Wilson benefits. Jesco next appealed to the Lee County Circuit Court, which reversed the MESC referee and Board of Review. Wilson now appeals to this Court regarding the circuit court order denying him benefits. We find that the referee's decision was supported by substantial evidence and was not

arbitrary or capricious. Therefore, we reverse the circuit court and reinstate the decision of the Board of Review affirming the referee's award of benefits.

STATEMENT OF FACTS

James Wilson had been employed by Jesco since August, 1989, and was fired in July, 1993. Wilson had been "written up" four times for various reasons from October, 1992, to July, 1993. Disputed evidence and testimony existed as to the reasons for Wilson's being written up and for his termination. However, the controversy actually centered on whether Wilson's conduct was misconduct that justified denial of unemployment compensation benefits.

Wilson had been given authority and responsibility by Jesco to discipline his subordinates based on his own discretion. Jesco contended that Wilson failed to properly enforce the company's attendance policy and wrote Wilson up for this on two occasions. The power to exercise discretion that Jesco gave Wilson was the same power that Jesco contended Wilson did not properly exercise. Jesco disagreed with Wilson's decisions and termed his exercise of discretion, in not disciplining subordinates, misconduct on his part.

DISCUSSION OF THE LAW AND ANALYSIS

Section 71-5-531 of the Mississippi Code states that "[i]n 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 (1972); *see also Mississippi Employ. Sec. Comm'n v. Bell*, 584 So. 2d 1270, 1272 (Miss. 1991) (citations omitted); *Wheeler v. Arriola*, 408 So. 2d 1381, 1384 (Miss. 1982). The Mississippi Supreme Court has stated that:

> [t]his 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). The court has also stated, regarding unemployment compensation claims, that "[i]f substantial evidence supports the Board's fact finding and the relevant law was properly applied to the facts, the appellate court must affirm." *Barnett v. Mississippi Employ. Sec. Comm'n*, 583 So. 2d 193, 195 (Miss. 1994) (citation omitted). Finally, 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) (citation omitted).

The MESC referee's decision to reverse the claims examiner's denial of benefits was based on a sufficient record, testimony, and documented evidence. He found that the main reason Wilson was

terminated was for unsatisfactory job performance since Wilson, as a maintenance lead man, failed to properly enforce Jesco's attendance policy. The referee stated that, even though Wilson may have shown bad judgment by his conduct, Jesco failed to show that Wilson was discharged for misconduct as defined by the Mississippi Employment Security Law. The referee analyzed both the facts and the evidence in determining that Wilson's conduct was not misconduct for which he should be denied unemployment benefits.

Moreover, the Mississippi Supreme Court has held that acts of an employee which may warrant termination of employment do not necessarily rise to the level of misconduct to disqualify that employee from unemployment compensation. *Allen*, 639 So. 2d at 907-08 (inefficiency, unsatisfactory conduct, inept performance, or good faith errors in judgment or discretion are not considered misconduct within the statute); *see also Bell*, 584 So. 2d at 1272 (no substantial evidence of misconduct existed or met the level of the clear and convincing standard, and no wilfulness could be reasonably inferred); *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.").

Despite Wilson's loss of employment by his own actions, his conduct does not rise to the level of misconduct as defined in *Allen*, *Bell*, and *Phillips*. Most importantly, this Court will not disturb the MESC referee's finding that Jesco failed to show that Wilson was terminated for misconduct. We hold that the referee's conclusions must remain undisturbed since they were supported by sufficient evidence and were not arbitrary or capricious. Finally, the referee's conclusions were not beyond the scope or power granted to the MESC and each party's constitutional rights were properly upheld.

We do not reach the issue of the lack of a record before the MESC appeals referee regarding Wilson's testimony. The referee's decision is dispositive since it was based on sufficient existing evidence and was not arbitrary or capricious. We find that Wilson is eligible to receive unemployment compensation benefits. Accordingly, we reverse the circuit court and reinstate the decision of the MESC Board of Review affirming the referee's award of unemployment compensation benefits to Wilson.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF DENIAL OF BENEFITS IS REVERSED AND THE AWARD OF UNEMPLOYMENT COMPENSATION BENEFITS IS REINSTATED. COSTS ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.