

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01103 COA**

BILLY W. POWELL

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

DATE OF JUDGMENT:	09/13/96
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PATRICIA KAY MONSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALBERT B. WHITE
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES (OTHER THAN WORKER'S COMPENSATION)
TRIAL COURT DISPOSITION:	DENIAL OF UNEMPLOYMENT BENEFITS AFFIRMED BY CIRCUIT COURT
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

BRIDGES, C.J., FOR THE COURT:

Billy Powell was denied unemployment benefits by the Mississippi Employment Security Commission and the Circuit Court of Harrison County after having been terminated by his employer, Treasure Bay Casino, for failing to report back to work after a medical leave of absence and a vacation. Powell appeals the denial arguing that his failure to return to work did not constitute misconduct. We conclude that the Board of Review's decision was supported by substantial evidence and was not arbitrary and capricious. We, therefore, affirm the holding of the circuit court.

FACTS

Powell was employed by Treasure Bay Casino for approximately fourteen months as a security guard. On March 22, 1995, Powell applied for and was granted a medical leave of absence for gall bladder surgery by Dr. Larry Killebrew. Dr. Killebrew provided Powell a certificate that stated that Powell would be able to return to work on May 16, 1995. The employer's witnesses testified that this was the only medical documentation ever received by Treasure Bay Casino as to when Powell could be expected to return to work.

Due to some financial problems, Powell requested vacation from May 16, 1995 through May 19, 1995, which was granted. On May 23, 1995, Powell failed to report to work. According to the Employee Handbook, a security department employee who is not coming to work is required to call in four hours prior to the beginning of his shift, otherwise he is deemed a "no call-no show" which is a termination offense. The referee's decision stated the casino attempted to contact Powell for several days, but were unsuccessful, and Powell was discharged for misconduct. Subsequently, the Mississippi Employment Security Commission Board of Review disqualified Powell from receiving unemployment benefits.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER POWELL'S FAILURE TO RETURN TO WORK CONSTITUTED MISCONDUCT AS DEFINED BY MISS. CODE ANN. § 71-5-513(A)(1)(b) (REV. 1995).

II. WHETHER THE COURT PROVED BY SUBSTANTIAL EVIDENCE THAT POWELL COMMITTED DISQUALIFYING MISCONDUCT PURSUANT TO MISS. CODE ANN. § 71-5-513(A)(1)(b) (REV. 1995) BY FAILING TO RETURN TO WORK AFTER BOTH MEDICAL AND VACATION LEAVE HAD EXPIRED.

Since Powell's issues both relate to the Commission's denial of his claim for benefits, we shall review them simultaneously. Our scope of review of the findings and decisions of an administrative agency such as the Mississippi Employment Security Commission is well established. 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). As stated by our Mississippi Supreme Court in *Mississippi Employment Sec. Comm'n v. Gaines*, 580 So. 2d 1230, 1234 (Miss. 1991), the Mississippi Employment Security Law was designed to give some protection to workers who, through no fault of their own, could not continue in their employment. The burden of proving misconduct by clear and convincing evidence rests with the employer. *Sprouse v. Mississippi Sec. Comm'n*, 639 So. 2d 901 (Miss. 1994).

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). In the case *sub judice*, the Commission's Board of Review found that Treasure Bay Casino terminated Powell's employment because of his own misconduct and therefore, denied Powell his unemployment benefits. The Mississippi Supreme Court defined "misconduct" in *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982), citing the Wisconsin case, *Boynton Cab Co. v. Neubeck*, 296 N.W. 636 (Wis. 1941), as follows:

[T]he meaning of the term "misconduct," as used in the unemployment compensation statute, was 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. 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.

The Mississippi Employment Security Commission adopted the *Wheeler* definition as Part V, Section 1720 of its Administrative Manual and went on to add that "[a]n employee shall not be found guilty of misconduct for the violation of a rule unless: (1) [t]he employee knew or should have known of the rule; (2) [t]he rule was lawful and reasonably related to the job environment and job performance; and (3) [t]he rule is fairly and consistently enforced."

Testimony by Terry Mallory, Director of Employment, indicated that Treasure Bay Casino has clear written rules requiring that the proper forms must be completed for an employee to get medical leave from work. An application for leave must include a return to work date, which can be extended if the employee provides additional medical documentation. Powell argues that he was continuously in contact with his employer and that he provided the additional medical documentation needed to support an extension; however, this was contradicted by the evidence adduced on behalf of the employer. The only doctor's certificate the Treasure Bay Casino received stated that Powell could return to work on May 16, 1995.

The supreme court has held that a violation of known company policies is "misconduct" and hence, a proper ground for dismissal. *See Mississippi Emp. Sec. Comm'n v. Lee*, 580 So. 2d 1227, 1230 (Miss. 1991) (denying discharged employee's claim for unemployment benefits because employee was terminated because he brought a loaded firearm to work in violation of his employer's written policy against doing so); *Picayune v. Mississippi Emp. Sec. Comm'n*, 525, So. 2d 1330, 1333

(**Miss. 1988**) (stating that Picayune had a "clearly announced and published directive or policy concerning the use of the telephone by employees of the police department," which the claimant "violated . . .with impunity," so that employee was guilty of misconduct as a matter of law and thus ineligible to receive unemployment benefits); *Mississippi Employment Sec. Comm'n v. Borden*, **451 So. 2d 222, 225 (Miss. 1984)** (holding that excessive garnishments by employee's creditors constitutes "misconduct connected with his work" which precluded employee's claim for unemployment benefits after employee had been dismissed under employer's policy against excessive garnishments).

The evidence from the testimony of Powell and five Treasure Bay Casino employees, including the five exhibits introduced, was sufficient to establish that Powell knew, or should have known, about Treasure Bay Casino's policy on medical and vacation leave as stated in the Employees Handbook. The supreme court has stated that "[a]n employer has the right to expect an employee to report to work as scheduled on a regular and timely basis and to give proper notification when absent." *Mississippi Employment Sec. Comm'n v. Bell*, **584 So. 2d 1270, 1271 (Miss. 1991)**. The evidence in this case clearly shows that Powell's actions caused his termination from Treasure Bay Casino. Whether Powell's behavior which led to his discharge was sufficiently adverse to his employer's interests to constitute "misconduct" was a question of fact resolved by the Commission against Powell. We cannot say it was manifestly wrong.

An employer, in the conduct of his business, must be able to determine work schedules and make task assignments to employees with some expectation that the employees will conform to the employer's directives. The Commission's assessment that Powell's failure to return to work after an approved medical leave of absence and a vacation rose to the level of "misconduct" that would require his disqualification from unemployment benefits appears to this Court to be well within the discretion extended to the Commission and therefore, this Court has no alternative but to affirm the ruling of the circuit court. *See Richardson v. Mississippi Employment Sec. Comm'n*, **593 So. 2d 31, 34 (Miss. 1992)**.

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

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.