

IN THE COURT OF APPEALS 1/14/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00779 COA

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

APPELLANT

v.

ROBERT W. MCINTYRE

APPELLEE

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

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MARK D. RAY

FOR APPELLEE:

PRO SE

NATURE OF THE CASE: UNEMPLOYMENT BENEFITS

TRIAL COURT DISPOSITION: UNEMPLOYMENT BENEFITS ALLOWED

BEFORE FRAISER, C.J., DIAZ, KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Rankin County reversed a decision of the Mississippi Employment Security Commission, denying unemployment compensation to Robert McIntyre.

The Commission has appealed from that decision. We reverse and render.

FACTS

McIntyre was employed by Multitech in Pelahatchie, Mississippi. Multitech's policies provided that any employee absent for three consecutive days without permission, would be considered as having quit his or her job.

On the night of June 13, 1994, McIntyre called the plant and spoke with a nonsupervising employee, who merely happened to answer the phone, and informed her that he would be absent for the funeral of an uncle.

McIntyre returned to work on June 19, 1994, at which time he was informed that he was no longer an employee of Multitech. Between June 13 and June 19, McIntyre made no effort to contact any supervisor or administrator at Multitech regarding his absence. McIntyre's claim for unemployment compensation was denied by the Employment Security commission because of his misconduct. He then appealed that denial to the Rankin County Circuit Court, which reversed that denial. The Commission has appealed that reversal.

ANALYSIS

Section 71-5-3 of the Mississippi Code declares as the public policy of this State, the assistance of eligible employees, who are "unemployed through no fault of their own." Miss. Code Ann. § 71-5-3 (1972).

Section 71-5-513 A(1)(b), provides that an employee who is discharged because of misconduct, shall not be eligible for unemployment benefits until he has rehabilitated himself, by earning eight times his weekly benefit. *Id.* § 71-5-513(A)(1)(b).

Misconduct is that conduct which demonstrates a willful or wanton disregard for the right of the employer. *Wheeler v. Arriola* 408 So. 2d 1381, 1383 (Miss 1982). McIntyre's failure to properly notify his employer of his extended absence is misconduct. *Barrett v. Mississippi*

Employment Sec. Comm'n, 583 So. 2d 193, 196 (Miss 1991).

THE DECISION OF THE CIRCUIT COURT OF RANKIN COUNTY IS REVERSED AND THE DECISION OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION IS REINSTATED. COSTS ARE ASSESSED TO APPELLEE.

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

**PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
SOUTHWICK, J.**

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PAYNE, J., DISSENTING:

I feel compelled to dissent. Technically, this employer may be able to justify firing this employee who, before he left for a family funeral, was unable to find a superior who could give him permission to leave. However, saying that that conduct rose to the level of "misconduct" which could prevent him from receiving unemployment compensation, is another matter.

The long accepted definition for "misconduct" in Mississippi unemployment compensation case law reads as follows:

[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 [S]tatute.

Booth v. Employment Sec. Comm'n, 588 So. 2d 422, 425-26 (Miss. 1991). See *Mississippi Employment Sec. Comm'n v. Borden, Inc.*, 451 So. 2d 222, 225 (Miss. 1984); *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982).

Allen v. Mississippi Employment Sec. Comm'n, 639 So. 2d 904, 907 (Miss. 1994).

Unlike the majority, I do not agree that the lower court correctly applied the law to the facts. That court's definition of *misconduct* requires that the attitude be *willful* and *wanton* and the actions be *deliberate* violations or disregard for employer's standards.

The supreme court has said that acts of an employee which may warrant *termination* of employment do not necessarily rise to the level of *misconduct* so as to disqualify the employee from unemployment compensation. *Id.* at 907-08. In *Mississippi Employment Security Commission v. Bell*, 584 So. 2d 1270 (Miss. 1991) the court cited a Minnesota case where the employee's absences were caused by a child's illnesses:

In light of [employee's] good faith efforts, her inability to find care for her child is not 'misconduct'. . . . [Employee's] actions were motivated by a willful regard for her child's interests and not a wanton disregard of her employer's interest or lack of concern for her job. Where the circumstances do not overwhelmingly demonstrate that an employee's absences are *deliberate*, *willful*, or *equally culpable*, we may also examine the employee's *history, conduct, and underlying attitude*.

Id. at 1274 (citation omitted). Similar language applies in this case. Bell was found by the court to be a victim of circumstances, as well as a good, long-time employee. The court found:

In this instance, Bell's good faith effort negates any alleged wanton disregard of her employer's interest. We hold that Frito Lay failed to prove by substantial, clear and convincing evidence that Bell's actions constituted misconduct under Miss. Code Ann. § 71-5-513 A(1)(b) (Supp. 1988).

Id.

To my way of thinking, the employer has not met its burden of proving misconduct consistent with the definition of misconduct in *Allen* and its predecessor line of cases. *Allen*, 639 So. 2d at 907. It is a sad day when a compassionate employee must choose between preserving income and comforting a

grieving family. It is not as if the company had no notice of his reason for absence, and that it was beyond the control of the employee to set the date for the funeral. It might be well to remind ourselves of the legislative intent of unemployment compensation expressed in Mississippi statutory law and quoted in *Shannon Engineering and Construction, Inc.*:

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which *requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family.* The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to *provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.* The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of *unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*

Shannon Eng'g & Constr., Inc. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 450 (Miss. 1989) (emphasis added) (citing Miss. Code Ann. § 71-5-3 (1972)).

Despite McIntyre's loss of employment *by his own actions*, his conduct does not rise to the level of *misconduct* as defined in *Allen and Bell*. No evidence exists that McIntyre acted in wanton disregard of Multitech's interest or from a lack of concern for his job. The commission's findings of fact are conclusive. However, I find that the facts as applied to the law indicate McIntyre's actions did not constitute misconduct. I would find, as did the circuit court, that McIntyre is eligible to receive unemployment compensation benefits. Therefore, I would affirm the lower court's judgment rendered in McIntyre's favor.

SOUTHWICK, J., JOINS THIS SEPARATE WRITTEN OPINION.