

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01262 COA**

ANNIE J. PRUITT

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:	10/2/95
TRIAL JUDGE:	HON. BILLY JOE LANDRUM
COURT FROM WHICH APPEALED:	JONES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RAYNOLD LEE WILLETT
ATTORNEY FOR APPELLEE:	JAN D. GARRICK
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES (OTHER THAN WORKER'S COMPENSATION)
TRIAL COURT DISPOSITION:	CIRCUIT COURT AFFIRMED DECISION OF THE BOARD TO DENY PRUITT ANY BENEFITS
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

EN BANC.

COLEMAN, J., FOR THE COURT:

Pursuant to her employer's discharge from her employment as a shift manager, Annie J. Pruitt filed her claim for unemployment benefits with the Mississippi Employment Security Commission (the Commission), which denied her claim on the ground of misconduct. Pruitt appealed the Commission's denial of her claim to the Circuit Court of Jones County, which affirmed the Commission's denial of her claim. Pruitt has appealed the circuit court's affirmance of the Commission's denial of her claim for unemployment benefits, and we affirm the circuit court's affirmance of the Commission.

I. FACTS

Pruitt had been employed at the Pizza Hut in Ellisville for approximately nine years when Freddie Triplett, the area general manager, discharged her from her position as shift manager on February 21, 1995. The immediate cause for Triplett's termination of Pruitt's employment was an incident which had occurred the day before when Pruitt pinched a fellow employee, Debbie Reese, on her breast during the noon buffet, a peak business period, in the presence of Pizza Hut's customers. The day before, Pruitt had also pinched Reese on her buttock while both were working at Pizza Hut. Pizza Hut's employee handbook contains a list of twenty one violations "that will be grounds for termination upon first offense." Rule 14 on the list reads, "Harassment of employees, customers or supervisors. This includes, but is not limited to, racial and sexual harassment."

II. HEARING

In a nonmonetary report of investigation which an employment interviewer for the Commission made to the Commission's program specialist for benefit payments, the employment interviewer reported that Jane Cooley, the Pizza Hut manager, had stated that Pruitt had been terminated "for violation of company policy regarding rules of conduct in the work place; more specifically sexual harassment, which warrants dismissal." Ms. Cooley then described the incident during which Pruitt pinched Reese as we described. Pruitt had responded to Cooley's version by stating that the incident was just horseplay and that Reese had not told her to stop after the incident had occurred. Pruitt also charged that Ms. Cooley, as the new manager, was "doing everything to get me to quit." Ms. Cooley rebutted Pruitt's allegations by stating that she "did not allow horseplay in the work place and always called it to [the employees'] attention if they did it." Based on the information which the nonmonetary report of investigation contained, the Commission denied Pruitt's claim for benefits because it found that she had been "separated from this employment for violating company policy regarding rules of conduct in the workplace by pinching a co-worker on the breast."

Pursuant to Pruitt's appeal of the Commission's denial of her claim for unemployment benefits, an appeals referee conducted a hearing on the Commission's denial. Ted Driver, the manager on duty at Pizza Hut on February 20, when the incident occurred, testified that Debbie Reese reported to him what Pruitt had done to her earlier that same day. Driver testified that Reese appeared visibly upset when she told him about the incident. Driver further testified that Reese told him that Pruitt's behavior was the type that "the labor board" would hear and that it was a matter "that a lawyer could handle real [sic] well." Reese expressed her concern to Driver that "a rumor might spread that she was a homosexual since Ellisville was such a small town." Driver testified that he calmed Reese and told her that he would speak to Pruitt about the incident. A short time later, Driver told Pruitt not to touch Reese or to even be around her at all. Driver testified that Pruitt did not deny touching Reese, but that Pruitt explained that she was "just picking with her."

The next day, Driver informed Janet Cooley, who had not been at the Pizza Hut when the incident occurred, about the encounter between Pruitt and Reese. At the hearing, Cooley testified that she called both Pruitt and Reese into her office to discuss their situation, after which she put them on different shifts and informed the area general manager, Freddie Triplett, of the episode. Cooley testified that when she asked Pruitt if she had pinched Reese on her breast, Pruitt did not deny that

she had done so. According to Cooley, Pruitt explained the matter by stating that Reese and she were just "playing around."

Freddie Triplett testified that because Pruitt had been a shift manager, she had attended Pizza Hut's "Manager on Duty," or MOD, classes, one of the segments of which was devoted to sexual harassment. Included in that segment, according to Triplett, was a twenty to twenty-five minute tape on sexual harassment. Triplett reasoned that because Pruitt participated in the MOD class, Pruitt "had full knowledge of what sexual harassment was" and that the conduct of which Reese had accused Pruitt was "not becoming of an employee of our company." Triplett also produced a copy of a receipt of Pizza Hut's employee handbook which Pruitt had signed on May 8, 1987, when she went to work for Pizza Hut. Language in the receipt acknowledges that the employee has read and understands the employee's handbook and that she will comply with that information. As we noted, among the reasons stated in the employees' handbook for "grounds for termination upon first offense" was "Harassment of employees, customers or supervisors, [which included] racial and sexual harassment." Triplett testified that he had dismissed Pruitt from her employment because she had violated this "ground[]" for termination upon first offense." Triplett further testified that Pruitt refused to sign the "notice of termination" form which he had presented to her when he terminated her employment. This form contained a blank space in which Pruitt might relate her version of the incident which had culminated in her dismissal from Pizza Hut's employment.

Yolanda Holybe, a shift leader at the Ellisville Pizza Hut, testified she had seen Pruitt and Reese "playing" around on a prior occasion. Holybe stated that Reese had told her that she wanted Pruitt to stop "messing" with her. Pruitt represented herself at the hearing, during which she admitted that she had touched Reese, but she claimed that she had touched her on the arm -- but not the breast. Pruitt repeated, "We were just playing around. You know, when we grab somebody. And you're playing around." She also stated that she neither admitted nor denied to Triplett that she had pinched Reese.

After the hearing, the appeals referee made these findings of fact:

Claimant was employed for approximately nine years for Pizza Hut, Ellisville, Mississippi, ending February 21, 1995. The claimant's position was shift manager. On February 19, and February 20, 1995, an employee reported that the claimant had touched her in a manner that was unwanted by the employee. The employee alleged that the claimant had pinched her breast. Regarding the allegations, the claimant did not admit or deny the allegations, and would only say that they were just playing around. Company policy states that harassment of any type is grounds for discharge. The claimant was discharged February 21, 1995.

In affirming the claims examiner's decision which denied Pruitt's claim for benefits, the appeals referee wrote:

The claimant was discharged for touching another employee in a manner that was unwanted by the employee. It is the opinion of the Referee that the claimant was discharged for misconduct connected with the work as that term is used in the Mississippi Employment Security Law. Therefore, the decision of the Claims Examiner is in order.

Pruitt appealed the decision of the appeals referee to the MESC Board of Review. On July 20, 1995, the Board adopted the Findings of Fact and Opinion of the Referee and affirmed that decision. Pruitt then filed a petition for review of the Board of Review's denial of her claim in the Circuit Court of Jones County. In his order of the case, the circuit judge found "that the decision of the Mississippi Employment Security Commission contains no error of fact or law and the same should be affirmed." This Court now reviews Pruitt's appeal of the circuit court's order.

III. REVIEW AND RESOLUTION OF THE ISSUES

Pruitt sets out three issues in her brief for this Court's review, analysis, and resolution. We quote the three issues directly from her brief:

1. The commission failed to follow the law.
2. The commission erroneously allowed hearsay evidence to control this case.
3. The commission failed to follow the evidence.

We choose to review simultaneously all three of Pruitt's issues because they all relate to the Commission's error of denying her claim for benefits and, hence, the circuit court's error of affirming the Commission's denial of her claim for benefits.

Section 71-5-531 of the Mississippi Code of 1972 permits and governs appeals from the MESC's findings. Section 71-5-531, which provides the standard of review in appeals arising from the Commission's Board of Review, reads in pertinent 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). "If 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 Employment Sec. Comm'n*, 583 So. 2d 193, 195 (Miss. 1991).

The legislature created the MESC and has set aside funds to be used as unemployment reserves "for the benefit of persons unemployed through no fault of their own." Miss. Code Ann. § 71-5-3 (Rev. 1995). The Mississippi Supreme Court has stated:

The eligibility and disqualification provisions set out in the Mississippi Employment Security Law clearly indicate that this law is for the protection of persons who are part of the force of working employees who are ready, willing and able to perform their work, but who, through no fault of theirs, are not permitted to do so, and the law is not to be used to reward those who, for reasons of their own, refuse to work at suitable employment.

Mississippi Employment Sec. Comm'n v. Fortenberry, 193 So. 2d 142, 144 (Miss. 1966).

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

September 8, 1997 [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.

Freddie Triplett testified that he discharged Pruitt from her job at Pizza Hut because she had violated Rule 14 in the Pizza Hut employees' manual which prohibited harassment, including racial and sexual harassment, of customers and other employees. 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).

Aside from Pruitt's violation of the rule which prohibited racial and sexual harassment of fellow employees, federal law prohibits sexual harassment. Ted Driver, to whom Reese first reported Pruitt's pinching her, testified that Reese told him that Pruitt's behavior was the type that "the labor board" would hear and that it was a matter "that a lawyer could handle real [sic] well." Reese also expressed her concern that the incident might start a rumor in Ellisville that she was gay. Pruitt's pinching Reese exposed Pizza Hut to potential litigation which Reese might bring for her sexual harassment by Pruitt while Pruitt worked for Pizza Hut. In *Borden*, the Mississippi Supreme Court described the burdens which garnishments imposed on an employer and concluded that "[a]ll this places additional financial burden on an employer who is contributing already to the state employment fund and subsidizing unemployment benefits under the act." *Borden*, 451 So. 2d at 224-25.

In his opinion, the appeals referee stated:

An employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced.

After the appeals referee had recited and considered this rule, he found that Pruitt's actions constituted misconduct and affirmed the denial of her benefits.

The evidence from the testimony of Pizza Hut's witnesses, including the three exhibits introduced pursuant to Freddie Triplett's testimony, was sufficient to establish that Pruitt knew, or should have known, about Pizza Hut's policy against harassment of employees, both racial and sexual. When Pruitt began working for Pizza Hut in 1987, she signed a receipt for Pizza Hut's employee handbook, which included a list of twenty one violations "that will be grounds for termination upon first offense." Among those twenty one violations was Rule 14 which prohibited harassment of employees, customers or supervisors, including racial and sexual harassment. Pruitt's training to become a shift manager included "Manager on Duty" classes. One of the topics of the classes Pruitt attended was sexual harassment, which included a video tape on the subject.

Pruitt contends the decision of the Board was based on evidence which was insufficient to show that her actions reached the level of "misconduct." The Mississippi Supreme Court has opined in *Mississippi Employment Sec. Comm'n v. McLane-Southern, Inc.*, 583 So. 2d 626, 628 (Miss. 1991), that "the word 'evidence' means 'substantial evidence' which is not uncorroborated hearsay." The court continued, "The burden of proving 'misconduct' is the employer's and to do so by 'substantial, clear, and convincing evidence.'" *Id.* Pizza Hut's burden was to prove Pruitt's misconduct by "substantial, clear, and convincing evidence."

In the *McLane-Southern* case, an employee was discharged for misconduct after getting into an altercation with another employee on the company premises. *Id.* at 627. The employee stated she was aware altercations on company property were against company policy, but she argued that she did not strike the other employee and was only trying to protect herself. *Id.* The circuit court reversed the decision of the Board and denied payment of the claimant's unemployment benefits. *Id.* at 626. The supreme court reversed the circuit court and reinstated the claimant's unemployment benefit. The supreme court opined:

This Court has held that uncorroborated hearsay testimony is insufficient to rise to the required level of substantial evidence. Since the employer offered nothing more [than uncorroborated hearsay testimony] in this case, it failed to meet its burden of proving disqualifying misconduct by substantial, clear, and convincing evidence.

Id. at 628 (citation omitted).

Pruitt complains that Pizza Hut's evidence of her pinching Reese as she did was uncorroborated hearsay because Pizza Hut did not call Reese to testify about what Pruitt did to her. However, both Triplett and Cooley testified that Pruitt admitted that she had pinched Reese on her breast when each of them talked with her about Reese's complaint. Pruitt denied to the hearing referee that she had

admitted her act to either Triplett or Cooley, but when the hearing referee asked Pruitt if she pinched Reese, Pruitt would neither admit nor deny that she had done so. Pruitt testified that she had pinched Reese on her arm while the two of them were just playing around.

In *Bolden v. Gatewood*, 250 Miss. 93, 164 So. 2d 721, 731 (1964), the Mississippi Supreme Court opined:

Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him. (quoting 31 C.J.S. *Evidence* § 272a, p.1023).

Regardless of hearsay considerations, the testimony of Triplett and Cooley that Pruitt admitted to each of them that she had pinched Reese was competent evidence against her if the hearing referee as the fact finder found their testimony credible, which he did.

IV. Conclusion

There was substantial evidence to support the appeal referee's denial of Pruitt's claim for unemployment benefits. The evidence of Pruitt's misconduct was not entirely hearsay because at least two of Pruitt's supervisors testified that she admitted to them that she had pinched Reese but sought to ameliorate her act by asserting that Reese and she were just playing around. The appeals referee correctly applied the law, which includes the statutory definition of "misconduct" for the purpose of awarding unemployment benefits, to the evidence in this case; the result of which was to deny Pruitt her unemployment benefits.

Thus, this Court comes to a conclusion similar to the conclusion which the Mississippi Supreme Court reached in *Borden*. In *Borden*, the supreme court determined "that seven garnishments from four different creditors of the employee with an announced and published plant policy against this conduct evidences 'conduct evincing wanton disregard of the employer's interest' and 'a disregard of standards of behavior which the employer has a right to expect.'" *Borden*, 451 So. 2d at 225. In the case *sub judice*, this Court concludes that Pruitt's pinching a fellow employee's breast during lunch hour while they were in the dining area of her employer's restaurant, when her employer had an announced and published [employees] policy against this conduct evidences conduct evincing wanton disregard of the employer's interest and a disregard of standards of behavior which the employer has a right to expect. This Court affirms the order of the Jones County Circuit Court which affirmed the Commission's denial of Pruitt's unemployment benefits based on her misconduct.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT IS AFFIRMED.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.