

IN THE COURT OF APPEALS 07/18/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CC-01006 COA

KAREN PRICE APPELLANT

v.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION
AND DEPOSIT GUARANTY NATIONAL BANK 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): WALTERINE LANGFORD

ATTORNEY(S) FOR APPELLEE(S): PAULA A. GRAVES

DANIEL P. JORDAN, III

JAN D. GARRICK

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: DENIED BENEFITS

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

PAYNE, 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 (MESc) denial of unemployment benefits to Karen Price. We find that the appeals referee's decision was supported by substantial evidence and was not arbitrary or capricious. We affirm the judgment of the circuit court denying benefits.

Price filed for unemployment benefits on January 18, 1994, with an effective date of January 16, 1994. Price was notified by letter dated January 31, 1994, of her disqualification of benefits. On January 31, 1994, Price filed an appeal from the denial and in February a hearing was held before Appeals Referee G.A. Gilly. In a decision dated February 22, 1994, the referee ruled that Price was discharged by Deposit Guaranty National Bank (DGNB) for misconduct. Price then filed an appeal by letter dated March 3, 1994. On April 4, 1994, the MESc Board of Review affirmed the decision of the appeals referee. Price next appealed to the Circuit Court of the First Judicial District of Hinds County on April 19, 1994. Circuit Court Judge L. Breland Hilburn, Jr. entered an order on September 9, 1994, affirming the decision of the MESc.

STATEMENT OF FACTS

Price was discharged by DGNB for lying. On January 6, 1994, Price punched her time card and left work with a fellow co-worker in order to conduct personal business at Jackson State University. Price's co-worker punched in at 3:50 p.m., while Price's card reflected a much earlier return time of between 2:30 and 2:35 p.m. Thus, Price's time card reflected a nineteen to twenty-nine minute absence from work, while her co-worker's time card reflected an absence of more than one hour and forty minutes. The actual length of Price's absence from work on January 6, 1994, remains in dispute.

DGNB discovered the discrepancy between the two workers' time cards and initiated an internal investigation into possible time card fraud. DGNB officials interviewed both Price and her co-worker several times each over a four-day period. This investigation by DGNB did not allow DGNB to resolve the matter to its own satisfaction as to the source or reason for the discrepancy between the two workers' time cards. However, DGNB was able to identify inconsistencies between the two workers' accounts of what occurred on January 6, 1994, from which DGNB determined Price had lied when questioned by DGNB personnel regarding her absence that day. Both employees gave inconsistent statements to DGNB concerning the length of time they were gone, whether they left together or separately, whether they returned together or separately, and the reason for their being absent from work. Price and her co-worker were subsequently discharged for lying because of inconsistent and changing statements. Each employee's case was heard by different referees. Price's co-worker was awarded unemployment compensation, yet Price's claim was disqualified from unemployment compensation. Price requests three issues for this Court to consider: (1) that Price's case disposition should have been the same as her co-worker who was also discharged for lying under the same set of facts; (2) that DGNB failed to meet its burden of establishing that Price was guilty of misconduct; and (3) that the decision of the circuit court was against the overwhelming weight of the evidence.

ARGUMENT AND DISCUSSION OF LAW

Price argues that because her disqualification for unemployment compensation was inconsistent with the disposition of her former co-worker's case, her disposition should have been modified so that the decisions were consistent. First, this portion of Price's claim is beyond this Court's scope of review in

that the first time this issue was raised by Price was to the circuit court. "Miss. Code Ann. § 71-5-531 (1972) and the decisions of this Court provide that, upon appeal, the Court consider the record made before the Board of Review. . . ." *Ray v. Bivens*, 562 So. 2d 119, 121 (Miss. 1990). This matter was not before the MESC review board and cannot be considered by this Court. However, we find persuasive Appellee's analogy to the criminal setting. Co-conspirators in a criminal setting often have cases tried before different judges and juries with different outcomes. Neither the MESC nor the employer should be required to provide unemployment claimants protection not afforded to criminal defendants.

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 (Supp. 1994).

The Mississippi Supreme Court recently 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). Additionally, 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).

In the present case there was substantial evidence to support the findings of fact made by the appeals referee and affirmed by the MESC Board of Review. DGNB met its burden of proof through the testimony of bank employees involved in the investigation. Manager Toby Stovall testified that Price gave inconsistent accounts to him regarding the events that took place on January 6, 1994, and that Price admitted to him that she had lied. Ms. Richardson, Personnel Officer, testified that there were discrepancies in Price's story as well as that of her co-worker. She also testified that Price admitted to not telling the truth when called in again to explain exactly what happened on January 6, 1994. The appeals referee's findings were supported by substantial evidence, which was also clear and convincing.

The appeals referee's findings of fact which were affirmed by the MESC Board of Review will not be overturned unless they are arbitrary or capricious. Price does not suggest that conduct such as lying, if true, does not constitute misconduct. Instead, Price would have this Court reweigh the evidence. The referee determined that Price gave inconsistent accounts to DGNB during its investigation into the time card discrepancies. The facts were well established through the testimony of DGNB employees who handled the investigation. The referee's determination was based on the evidence

presented by DGNB in full regard for the applicable law. Thus, the findings of the appeals referee were not arbitrary or capricious and no reversal is indicated. We affirm the judgment of the circuit court.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF DENIED BENEFITS IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

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