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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONNIE ALEXANDER, ET AL — PLAINTIFFS

V. — CIVIL ACTION NO. 2008-CC-00013

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND MISSISSIPPI POLYMERS — DEFENDANT

STATEMENT OF ISSUES

Ronnie Alexander, et al, Appellants do hereby state the Issues in this action they plan to present on appeal, against the Appellees, Mississippi Department of Employment security and Mississippi Polymers are as follows:

1) The Administrative Law Judge, the Board of Review of the Mississippi Department of Employment Security and the Circuit Court abused their discretion by holding that the reason for the layoff was vacation in one part of the Decision and/or for maintenance in another part of the Decision, when, in fact, the layoff was caused by a lack of work.

2) The Administrative Law Judge, the Board of Review of the Mississippi Department of Employment and the Circuit Court abused their discretion by finding that the Appellants were not entitled to employment compensation benefits when the plant was closed for more than three (3) weeks during a calendar year for lack of work.

Respectfully Submitted,

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STATUTES

STATEMENT OF THE CASE

This is an appeal from the decision of the Mississippi Department of Employment Security (MDES) disallowing unemployment benefits to employees for a period when the Plant was closed for a full week during the week in which Thanksgiving occurred, and more than two (2) weeks during the time around Christmas and New Years day.

Upon application for unemployment benefits, MDES first disallowed the claims, but later determined that the plant closing was not for holidays, and allowed and paid the benefits. The Employer appealed, and an Administrative Law Judge conducted a telephone hearing, and thereafter, reversed the allowance of benefits. The case was appealed by the employees to the Circuit Court of Alcorn County, which summarily affirmed the Administrative Law Judge's decision. This is an appeal to the Appellate Court by the employees who were denied unemployment benefits to prevent MDES from recovering the benefits that the Employees have received.

STATEMENT OF FACTS

On or about December 20, 2006, the Claimants and each of them executed a Mass Layoff Claim Benefits, seeking unemployment compensation benefits. (R. Vol 1, P1) The Mississippi Department of Employment Security (hereinafter referred to as MDES) had previously mailed to claimants on December 4, 2006, a Notice Benefit Determination. (R.Vol 1, P2). On January 9, 2007 MDES mailed to Claimants a Notice of Nonmoneytary Decision, denying Claimants unemployment benefits and cited that portion of Section 71-5-511, Mississippi Code, 1972, which states: that the claimants

were "prima facie unavailable for work for a holiday or vacation period." (R. Vol 1, P 4) Claimants filed an Application For Reconsideration, and on February 23, 2007, MDES mailed to Claimants a decision reversing the prior decision of MDES, stating that the layoff was not related to vacation or any holiday period. (R. Vol 1, P 5) (Vol 3, P 493) The foregoing were the facts concerning the claim of Ronnie Alexander, and similar claims for the other Claimants can be seen in Vol. 1 & 2, PP6-490.

On December 21, 2006, the Employer, Mississippi Polymers, had communicated to MDES that the there had been no layoff, but rather, a maintenance shut down and the benefits should not be disallowed. (Vol 3, P. 492) In addition, on February 28, 2007, the Employer wrote a letter protesting the allowance of benefits and appealing the decision. (Vol 3, P 494). Names of the affected employees can be seen at Vol 3, pp 498-500.

MDES, on April 11, 2007, scheduled a telephone hearing for April 24, 2007. (Vol 3, p 496 At the hearing, Donna Wesson, the Company representative, testified that the plant was not in operation. (Vol 3, pp 502-503) Mrs. Wesson continued her testimony by stating that during the times for which the employees had sought unemployment benefits, the Holidays during that period were Christmas, Christmas Eve, New Years Eve and New Years Day. (Vol 3, p 504) The length of time for each Holiday is defined in the Collective Bargaining Agreement (Page 21) as being 24 hours, or one (1) day for each holiday. (Vol 3, p 515) Although Ms. Wesson testified that the plant was closed for maintenance, and not for lack of work, (Vol 3, p 517), the Notices the Employer posted for the purpose of informing the employees, told an entirely difference story. The Notices stated that the shut down for a week at Thanksgiving was because of lack of

work and further stated that the Employer anticipated some decrease in orders which might cause the employees to have less work the rest of the year, and an increase is not anticipated until the First Quarter of 2007. (Vol 3, pp 515-516), (Vol 3, p 564) A Notice dated August 23, 2006 admitted that there was a lack of work. (Vol 3, p 567). This was, of course, through December 2007, for which period of time the claims were filed.

The employer further admitted that the shut downs for Thanksgiving (a full week) and for Christmas 2006 (16 days) was the longest ever. (Vol 3, p 518) Shut downs in 2006 was the first time the employees could get their qualifying week at the Thanksgiving shutdown and be qualified for benefits during the shut down from December 17, 2006 until January 2, 2007. (Vol 3, p 539) The length of time the plant was closed for preceeding years can be seen in Vol 3, pp 540-549.

The Administrative Law Judge held that the employees were unavailable for work due to a holiday or vacation period. (Vol 3, p 574) Yet, on the very next page, the Administrative Law Judge held that the shut down was a designated maintenance shutdown.

The Board of Review adopted the findings of fact of the Administrative Law Judge, and affirmed the decision. Vol 3, p 596)

SUMMARY OF THE ARGUMENT

Section 71-5-511(d), Mississippi code, 1972 provides a waiting period of one (1) week before an employee can draw unemployment benefits, but after the one week waiting period, the employee is entitled to benefits for any full week that work is not available for him. The employer and MDES have invoked Section 71-5-511(k), which

states that the employee is deemed unavailable for work during a holiday or vacation. MDES has added a Shutdown for maintenance to the Statute as a disqualifying reason.

First, the Shutdowns were clearly from lack of work for all three (3) weeks. Secondly, a Shutdown for maintenance does not disqualify a Claimant from receiving benefits, provided the layoff is of a sufficient length in time. The reason this question has not arisen before 2006, is because the Company never closed the plant for more than one full week in association with a holiday.

ARGUMENT

The Standard of review of an administrative agency's findings and decisions is limited and a rebuttable presumption that the agency's decision is correct and the burden of proving otherwise rests with the claimant. However, it is the employer that carries, in the first instance, the burden of proof to show by clear, convincing, and substantial evidence that the employee is disqualified from receiving unemployment benefits. Mississiippi Employment Security Commission v. Woods, 938 So.2d 359, (Miss. 2006).

Section 71-5-511 provides that an employee is entitled to unemployment benefits (a)(i) if he continues to report to an employment office; (c) he is able to work and is available for work; and, (d) he has been unemployed for a waiting period of one (1) week. The Employer and MDES invoke subparagraph (k), which disqualifies the employee to receive benefits during a holiday or vacation. Even accepting the position of the Employer, which is denied, the shutdown was not for vacation or a holiday, but according to the Employer, the shutdown was for maintenance, which does not disqualify

the employee from drawing benefits, However, when the facts are examined, it is conclusive that the reason for the shutdown was lack of work.

The Plant was closed for a week during Thanksgiving, 2006. A Notice to the Employees dated November 7, 2006 was posted stating that: " Business is slower than we expected, even for this time of year and we're struggling to load four calendars. We have some new programs on the horizon and anticipate being busy the first quarter in 2007. However, we need to do something until then to get us there. Therefore, the best thing to do is to close the plant the week of Thanksgiving and hopefully allow orders to catch up. (R. p. 564, Ex. 3)

The employees filed with the Department of Employment security for unemployment benefits, and the week of Thanksgiving supplied the one (1) week waiting period before being qualified to draw unemployment benefits under Section 71-5-511 (d), Mississippi Code, 1972 for the year 2006. The clear reason for failing to work the employees during the entire week of Thanksgiving was, admittedly, lack of work. The Notice dated November 7, 2006 concerning Thanksgiving closure (R. p. 564, Ex 3), also discloses that Orders would be slow past Christmas 2006.

Another Notice, titled "2006 Christmas and New year's Holidays", was then given to the employees on November 29, 2006 stating that the plant would be closed from December 17, 2006 to January 2, 2007. (R p. 539, Ex. 1) The Plant shut down beginning before Christmas and ending after New Years day consisted of 16 days and the longest ever. (R, p 518).

The employees, again filed for unemployment benefits on or around December 18, 2006. The claims were first denied by letter dated January 9, 2007 because it was alleged

that the 16-day period was a "designated holiday or vacation period. (R. p. 263) However, on February 23, 2007, the Mississippi Department of Employment Security gave Notice that "The closure.was not related to a vacation or holiday period", and the employees were entitled to receive unemployment compensation (R. p. 264). The Compensation was paid.

The employer then appealed the decision and on April 24, 2007 a telephone conference hearing was held. The Administrative Law Judge stated that the issue for hearing was " whether or not the claimant is prima facie unavailable for work due to a holiday period or vacation period for weeks ending December 23, 2006 and December 30, 2006. (R. p 574) The Administrative Law Judge rendered her opinion affirming the Board of Review, using Section 71-5-511 (k), which states that an employee is not eligible for Benefits during a holiday or vacation (R p. 574), while finding that the "claimants are prima facie unavailable for work as they were on a designated maintenance shutdown". (R. p. 575)

There is error on the face of the decision of the Administrative Law Judge's decision. I cannot find in my reasoning ability, if I have any, that a "Designated Maintenance Shutdown" is the same thing as a "Holiday or Vacation."

Holidays are clearly identified in the collective Bargaining Agreement. (R. p. 561-562 Ex. 2). There are twelve (12) holidays and each one is limited to one (1) day. In addition, if all sixteen (16) days were holidays, the employees would be entitled to pay for each day. (R. p. 561-562, Ex. 2). Likewise, Vacations are set forth in the Collective Bargaining Agreement, page 22, and are, again, with pay. (R. p.562, para 3)

Why has this issue not raised it head before? Because in 2006, the shutdowns were

the longest ever, and the shutdowns have become longer each year. The truth of the matter is that the Company has had less work for the employees and has elected to shut down during the holidays, call its shutdown a holiday and avoid wages and the payment of Unemployment benefits.

The collective bargaining agreement provides for no strikes by the employees and no lockouts by the employer. The purpose of the entire agreement is to give the employer its needed labor force, and at the same time, provide steady work for the employees. The employees have a vested interest in the employer providing work for the support of their families. To allow the employer to avoid wages for work and unemployment benefits, while the employees go two (2) weeks, at Christmas time, without being paid, should not be allowed.

There are four (4) cases decided by the Mississippi Appellant Courts which have a bearing on the questions raised in this case.

MESC v. Jackson, 116 So2 830 (Miss. 1960) appears to be the earliest case decided by the Mississippi Supreme Court. In that case, employees with seniority were granted, by the Collective Bargain Agreement, a week vacation with pay and the plant could not operate during the period that the employees with seniority were absent. In addition, the closure of the plant was in accordance with the Collective Bargaining Agreement. The employees were allowed unemployment benefits for two (2) of the three (3) weeks that the plant was shut down, but were denied benefits for the one (1) week that the plant was closed during the week that the employees with seniority did not work.

The question in JACKSON for the one (1) week, was whether the employees were involuntarily unemployed and were not available for work?

The Mississippi Supreme Court agreed with MESC, and held that the one (1) week shut down was provided by the collective bargaining agreement. The Mississippi Supreme Court used some unfortunate language in it's decision by saying: "They were not laid off; their employment had not been terminated, and the relationship of employer and employee continued during the week the plant was closed". If that were the reason for the disallowance of benefits, not only would the employees have been disqualified for the one (1) week, but would also have been disqualified for the other the two (2) weeks, which were allowed.

The second case decided by the Mississippi Appellant Court was Smith v. MESC, 344 So2 137 (Miss. 1979). The employee had taken a pregnancy leave, however, prior to the time she was to return to work she was informed that because of business conditions, her position had been temporarily eliminated. The Appellant Court held that Mrs. Smith was entitled to unemployment compensation benefits. The Court said that she was an employee while on pregnancy leave and had been laid off.

The third case is Buse v. MESC, 377 So2 137 (Miss. 1979). Buse was laid off and under his Collective Bargaining Agreement, he received $525.23 for two weeks accumulated vacation pay for the past year. The Court held that Buse had earned the vacation pay prior to his lay-off and was entitled to unemployment compensation.

The fourth and final case to be cited is MESC v. Funches, (782 So2 760, Miss. 1999). The Union and the Company had agreed in the Collective Bargaining Agreement that

during Independence week, the plant could designate one week prior or after Independence week as a vacation. The Board of Review denied benefits. The Appellant Court held: "Nothing in the collective bargaining agreement required the removal of Funches from Delphi Packard Electric's employment roll. While Funches was unavailable for work during what was termed a 'vacation shutdown period', it cannot be argued legitimately, on the facts, that Funches was on vacation.".

CONCLUSION

The reasons this case should be reversed are as follows:

1) The employees have a vested interest in full time employment in exchange for providing the employer with the needed labor force.

2) The reason for the layoffs was a lack of work, not vacation.

3) Each year the shut downs get longer and the lay-offs in 2006 were the longest ever.

4) If the employer's position is affirmed in this case, there is no limit to the length of time the employer can close the plant, without compensation to the employees, so long as a holiday falls within the time of the Shutdown and the time, ever how long, is designated as a holiday by the employer.

5) Holidays are specifically stated in the Collective Bargaining Agreement, together with the length of time for each holiday.

6) The employees are paid for Holidays and Vacations under the Collective Bargaining Agreement, but not for this closure even though it is said to be a holiday.

7) The employees were available for work.

8) These employees were not on Vacation.

9) MESC's holding that closing for maintenance and/or for lack of work is the same as a Holiday or Vacation is unreasonable.

Respectively Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day mailed by U. S. Mail, postage prepaid, a true and correct copy of The foregoing Brief of Appellant to: Hon. LeAnne F. Brady, Attorney for MDEC, P. O. Box 1699, Jackson, MS 39215-1699; and, Hon Wendell H. Trapp, Attorney for Mississippi Polymer, P. O. Box 1200, Corinth, MS 38835-1200.

SO CERTIFIED this the 22nd day of February 2008.

Charles R. Wilbanks, Sr.