IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAUSE NO. 2010-CC-01325

MILTON PILATE — **APPELLANT**

V. — **CAUSE NO. 2010-CC-01325**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND TA OPERATING, LLC — **APPELLEES**

BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY
STATE OF MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, Appellee
2. Albert Bozeman White, Assistant General Counsel for Appellee
3. LeAnne F. Brady, Senior Attorney for Appellee
4. Thomas Hudson, Esq., Attorney for Appellant
6. Milton Pilate, Appellant
7. TA Operating, LLC, Appellee
8. Honorable Jeff Weill, Sr., Hinds County Circuit Court Judge

This the 15th day of June, 2011.

Albert Bozeman White
Assistant General Counsel (MSB [redacted]
Mississippi Department of Employment Security

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STATEMENT OF ISSUE

1. Whether the Board of Review and Circuit Court decisions should be affirmed, finding that the Employer, **TA OPERATING, LLC**, proved by substantial evidence that the Claimant, **MILTON PILATE**, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(Rev. 2010), by willfully and wantonly violating the Employer's safety policy, after warnings, and while on probation?

STATEMENT OF THE CASE

MILTON PILATE [hereinafter also "Claimant"] was employed by **TA OPERATING, LLC** [hereinafter also "Employer"] as a mechanic from June 15, 2003 to April 10, 2009, when he was discharged. (R. Vol. 2, p. 37). Mr. Pilate was discharged for repeatedly violating the Employer's safety policies, and while he was on ninety (90) days probation. (R. Vol. 2, p. 9, 11, 43-45). Mr. Pilate was placed on probation on February 25, 2009, for allowing a customer to use a blow torch and work on his personal vehicle in the company shop.

When placed on probation due to this incident, Mr. Pilate was told that if any other infractions occurred during his ninety day probation, no matter how minor, he would be immediately discharged. (R. Vol. 2, p. 44-45). Subsequently, he violated the safety policy on April 9, 2009, by driving a company truck in an unsafe manner. Mr. Pilate was aware of the company safety policies, and admitted knowing that he would be terminated for any other infractions during his ninety day probation. (R. Vol. 2, p. 48-49-55-56).

After termination, Mr. Pilate filed for unemployment benefits with the Mississippi Department of Employment Security [hereinafter also "MDES"]. (R. Vol. 2, p. 1). An adjudicator investigated. A Questionnaire was obtained from the Employer, along with documents including the pertinent part of the Employer's policy, an Employee Counseling Form dated February 25, 2009, and a Personnel Action Form dated April 10, 2009. (R. Vol. 2, p. 7-11). The adjudicator also interviewed Mr. Pilate and an Employer Representative. (R. Vol. 2, p. 12-16).

The Employer's statement to the adjudicator was consistent with the facts set out herein above. Additionally, the adjudicator reported that on the date in question, April 9, 2009, Mr. Pilate admitted jumping a curb with a shop truck. (R. Vol. 2, p. 15-16). Mr. Pilate also admitted

that he was on probation at the time due to an incident on February 25, 2009; and he knew that immediate discharge would result from another infraction while on probation. (R. Vol. 2, p. 16).

Based on the information obtained, the adjudicator disqualified Mr. Pilate, finding that he was discharged for operating a company vehicle in an unsafe manner, after being warned and suspended, and told that any other incidents would result in termination. (R. Vol. 2, p. 18-20).

Mr. Pilate appealed. (R. Vol. 2, p. 22). A telephonic hearing was noticed and held. (R. p. 25-30, 31-68). The Employer was represented by Marlene Sartin, a non-attorney employer advocate with Employer's Edge. (R. Vol. 2, p. 31-32). Todd Avery, General Manager, testified on behalf of the Employer. (R. Vol. 2, p. 39-47, 55-56, 60). Mr. Pilate, proceeding *pro se*, also testified. (R. p. 47-54, 58-59, 62).

After the hearing, the Administrative Law Judge [hereinafter also "ALJ"] affirmed the adjudicator's decision, finding that Mr. Pilate committed disqualifying misconduct when he was discharged on April 9, 2009, for a safety violation while on probation. (R. Vol. 2, p. 69-72).

Mr. Pilate again appealed. (R. Vol. 2, p. 73). This matter came before the Board of Review. After reviewing the record, the Board of Review remanded this matter to the ALJ to obtain the testimony of the Employer's Field Manager, who witnessed Mr. Pilate's alleged unsafe behavior on the date in question. (R. Vol. 2, p. 75, 77-78). The Order remanding also stated that the ALJ was to obtain testimony from the appellant, and any other evidence; and then return the record to the Board for a final determination. (R. Vol. 2, p. 77).

A second hearing was noticed and occurred on November 23, 2009. (R. Vol. 2, p. 78-80, 81-105). Mr. Pilate participated, along with Marlene Sartin and Todd Avery for the Employer. The testimony of Van Sheppard, Field Manager, was obtained. (R. Vol. 2, p. 90-92). Mr. Avery

also testified. (R. Vol. 2, p. 93-95). Mr. Pilate was also given the opportunity to cross-examine Mr. Sheppard and Mr. Avery and testify. (R. Vol. 2, p. 96-103).

This matter again came before the Board of Review December 17, 2009. After considering all of the evidence, the Board affirmed adopting the ALJ's original Fact Findings and Decision. (R. Vol. 2, p. 106-107). The ALJ's Fact Findings, and Reasoning and Conclusion, were as follows, in pertinent part, to-wit:

Findings of Fact

The claimant was employed approximately fifteen months, as a mechanic by TA Operating LLC, Jackson, Mississippi, ending April 9, 2009.

The employer discharged the claimant for violating company policy by not following safety procedures. He had been placed on ninety day probation on February 25, 2009 for a safety violation. The claimant had given a torch to a driver to work on his vehicle in the shop. The claimant was aware only employees are to be in the shop. He was advised he would be terminated if there were any other safety violations. (Emphasis added).

On the claimant's last day of work while operating a company vehicle he ran up over a curb and went on the grass which was an unsafe action. He admitted doing this to the General Manager. (Emphasis added).

Reasoning and Conclusion

Section 71-5-513 A (1) (b) of the *Mississippi Employment Security Law* provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department,... Section 71-5-513 A (1) (c) of the *Mississippi Employment Security Law* provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment....

In the Mississippi Supreme Court, in the case of *Wheeler vs. Arriola*, 408 So. 2d 1381 (Miss. 1982), the Court held that:

"The 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 the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term..." . (Emphasis added).

The Administrative Law Judge finds the employer's testimony as plausible and logical.

The claimant was discharged for having another safety violation while on probation. He was aware that this was grounds for immediate termination.

The claimant's actions in having another safety violation while on probation for a prior violation shows a willful and wanton disregard of the employer's interest and constitute(s) misconduct connected with the work.

The determination of the Department is in order. Emphasis added).

(R. Vol. 2, p. 71-72).

Mr. Pilate then appealed the Board of Review's decision to the Circuit Court of Hinds County, Mississippi. (R. Vol 1, p. 3-15). The Answer of the MDES and record transcript was filed on March 4, 2010. (R. Vol. 1, p. 16-17). On August 2, 2010, the Circuit Court entered its Order Affirming Decision. (R. Vol. 1, p. 18-19). Mr. Pilate then appealed to this Honorable Court. (R. Vol.1, p. 19-24).

SUMMARY OF THE ARGUMENT

In the case of Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982), the Supreme Court adopted the following definition of misconduct in unemployment benefit cases, to-wit:

> The 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 the standards of behavior which the employer has the right to expect from his employees... (emphasis added).

The case authorities consistently hold that even one willful and wanton, or grossly negligent violation of reasonable Employer policy may constitute disqualifying misconduct, particularly where the policy so provides, and the violation is of a serious nature. Miss. Emp. Sec. Comm'n. v. Percy, 641 So. 2d 1172 (Miss. 1994); Henry v. Miss. Dept. Emp. Sec., 962 So. 2d 94 (Miss. Ct. App. 2007); Johnson v. Miss. Emp. Sec. Comm'n., 767 So. 2d 1088 (Miss. Ct. App. 2000); Ray v. Bivens, 562 So. 2d 119 (Miss. 1990). Further, the case authorities also hold that where an employee has been progressively disciplined according to the Employer's policy, and given a final warning, a subsequent policy violation typically constitutes misconduct. Miss. Emp. Sec. Comm'n. v. Barnes, 853 So. 2d 153 (Miss. Ct. App. 2003).

In the instant case, the facts as to the final incident were disputed by Mr. Pilate. The Board of Review remanded this matter for additional testimony and evidence. Afterwards, the Board of Review found the Employer's witnesses' testimony credible and persuasive, finding that the Employer established misconduct by substantial evidence.

At the second hearing, an eye-witness, Van Shepard, Field Manager, testified that he was at the Employer's workplace on the date of the final incident. He testified that the Employer installed a bar gate or parking system, and that shop truck drivers activated the bar gate with a ticket to enter and exit. (R. Vol. 2, p. 90-91). Mr. Shepard also testified that he witnessed a

truck avoid the bar gate, by driving the truck on to the curb and grass, and going under the bar. (R. Vol. 2, p. 91). Mr. Shepard described the position of the truck, stating that the passenger's side wheels were up on the curb, such that about half of the vehicle was on the grass. This enabled the driver to go under the bar. (R. Vol. 2, p. 92). Because this action appeared to be unsafe, Mr. Shepard reported this incident to Mr. Todd Avery, the General Manager, so that he could check the fuel tickets and identify the driver. (R. Vol. 2, p. 91-92). Mr. Avery testified that he determined that Mr. Pilate was driving the truck based upon the time frame, and by checking fuel tickets. (R. Vol. 2, p. 93-94).

At the first hearing, Mr. Avery's testimony established the policy and that Mr. Pilate was on ninety day probation beginning February 25, 2009, for another safety infraction. Mr. Avery's testimony, as well as Mr. Pilate's testimony, also established that Mr. Pilate was aware, or should have been aware, of the safety policy; and he knew that any other safety infractions while on probation would led to immediate discharge.

In unemployment benefit cases, the Board of Review is the finder of fact and is entitled to resolve conflicts in the testimony. The record testimony in this case, though conflicting, is sufficient for MDES to find that Mr. Pilate violated the Employer's safety policy on April 9, 2009, while on probation for a previous safety violation. Thus, this Honorable Court should affirm the decision of MDES based upon the standard of review on appeal. Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (1992); Booth v. Miss. Emp. Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

ARGUMENT

Mr. Pilate's appeal is governed by Mississippi Code Annotated Section 71-5-531 (Rev. 2010), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the **appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied.** (Emphasis added). Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So. 2d 193 (Miss. 1991); Booth v. Miss. Emp. Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

Further, a rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Miss. Emp. Sec. Comm'n., 639 So. 2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Further, misconduct imports conduct that reasonable and fair minded external observers would consider wanton disregard of the employer's legitimate interests. Miss. Emp. Sec. Comm'n. v. Phillips, 562 So. 2d 115, 118 (Miss. 1990).

Facts

In the instant case, Mr. Todd Avery testified first. (R. Vol. 2, p. 39-47). Mr. Avery stated that Mr. Pilate was employed from January 15, 2008 until April 9, 2009, when he was discharged for a safety violation. He was terminated due to an incident in which he drove a truck around a bar gate blocking the entrance to a paid parking lot. The incident was witnessed by the Field Manager. (R. Vol. 2, p. 40-41).

Mr. Avery further testified that Mr. Pilate had a card that would allow him to enter the parking area. Alternatively, a button on the gate allowed him to request that someone activate the gate. (R. Vol. 2, p. 40-41). Mr. Avery also stated that he questioned Mr. Pilate; and he admitted running over the curb and onto to the grass to bypass the gate.

Mr. Avery was questioned about the Employer's policy. (R. Vol. 2, p. 42). He stated that the safety policy was in the Handbook and Mr. Pilate signed for it. (R. Vol. 2, p. 42). Mr. Avery also said there was a safe vehicle operation policy, and employees watch a video. Mr. Avery also commented that as a matter of common knowledge, Mr. Pilate should know not leave the road to go around a gate. (R. Vol. 2, p. 43).

Mr. Avery was also questioned about why Mr. Pilate was discharged over this incident. (R. Vol. 2, p. 44-45). Mr. Avery stated that the final incident would not normally be grounds for immediate discharge, except Mr. Pilate was on ninety day probation, beginning February 25, 2009, for another safety violation. (R. Vol. 2, p. 44-45).

Regarding the February 25, 2009 incident, Mr. Avery testified that unauthorized persons were not allowed in the Employer's shop, due to lack of insurance covering such persons. However, Mr. Pilate, a mechanic, violated the policy by allowing a customer to work on his personal vehicle in the shop. He also gave the customer a blow torch to work on his vehicle, which was considered dangerous. (R. Vol. 2, p. 44-45). Mr. Pilate was placed on ninety day probation, and was informed that any other incidents during this time would result in immediate termination. (R. Vol. 2, p. 44-45).

On re-direct, Mr. Avery later testified that Mr. Pilate was previously told that customers could not use a blow torch in the shop. Mr. Pilate also did not have permission to let the customer use the blow torch. (R. Vol. 2, p. 55-56).

Regarding the February 25, 2009 incident, Mr. Avery also questioned Mr. Pilate's supervisor, Greg Jones. Mr. Jones stated that he did not become aware of the matter until the customer already had the blow torch, and was almost finished with the work. (R. Vol. 2, p. 56). Mr. Avery once again stated that Mr. Pilate was informed at the time of his probation that he would be terminated for any safety violation, no matter how minor, occurring during his probation. (R. Vol. 2, p. 55-56).

Mr. Pilate testified next. (R. Vol. 2, p. 47-53). Mr. Pilate acknowledged his dates of employment as a mechanic. He acknowledged that he received a handbook containing the company policies. (R. Vol. 2, p. 47-48). He knew that he was on probation and knew he could be terminated for another policy violation while on probation. (R. Vol. 2, p. 50-51).

Regarding the final incident, he stated that he fueled the truck for a road call. He stated that he was not aware that he jumped the curb; and his tires may have only scrapped the curb while he was going through the gate. (R. Vol. 2, p. 53-54). In his closing remarks, Mr. Pilate claimed that he was discharged due to an economic downturn; and a Verification of Employment ["VOE"] sent after his termination indicated an economic downturn to be the reason. (R. Vol. 2, p. 58-59).

In his closing, Mr. Avery responded that the Personnel Action forms confirmed the real reason for Mr. Pilate's termination. (R. Vol. 2, p. 7-11). He also stated that VOE's are prepared by third parties for the Employer, indicating that the preparer either did not know the real reason, or gave a general answer. (R. Vol. 2, p. 60). Mr. Avery further indicated that since Mr. Pilate worked on commission, he would not have been discharged due to an economic downturn. (R. Vol. 2, p. 60).

As stated above, after this matter initially came before the Board of Review, it was remanded to the ALJ for further testimony. (R. Vol. 2, p. 76-66).

At the second hearing, an eye-witness, Van Shepard, Field Manager, testified that he was at the Employer's workplace on the date in question. He testified that the Employer installed a bar gate parking system, and that shop truck drivers activated the bar gate with a ticket to enter and exit. (R. Vol. 2, p. 90-91). Mr. Shepard also testified that he witnessed a truck driver avoid the bar gate by driving the truck on to the curb and grass and under the gate in an unsafe manner. (R. Vol. 2, p. 91). Because this appeared to be unsafe driving, Mr. Shepard described the position of the truck, stating that the passenger's side wheels were up on the curb, such that about half of the vehicle was on the grass. This enabled the driver to go under the bar. (R. Vol. 2, p. 92). Mr. Shepard reported this incident to Mr. Avery so that he could check the fuel tickets and identify the driver. (R. Vol. 2, p. 91-92). Mr. Avery further testified that he determined that Mr. Pilate was driving the truck based upon the time frame and by checking fuel tickets. (R. Vol. 2, p. 93-94).

In closing, Mr. Avery stated once again that Mr. Pilate was not discharged due to payroll cuts. Mr. Avery, in closing, also indicated that Mr. Pilate would not have been laid off to reduce payroll because he was paid based on production, and he was the second top producer. (R. Vol. 2, p. 100).

Case Authorities

The instant case is akin to the misconduct line of cases involving a grossly negligent, or willful and wanton, and substantial or serious disregard of an employee's obligations to the employer, and the employer's interest. In these cases, the behavior causing termination is within the capacity and control of the employee, is a serious disregard of work-related duties and constitutes misconduct. *See* Miss. Emp. Sec. Comm'n. v. Lee, 580 So. 2d 1227 (Miss. 1991) (Taking gun to work in violation of policy is misconduct); Miss. Emp. Sec. Comm'n. v. Flanagan, 585 So. 2d 783 (Miss. 1991) (Teacher striking pupil in violation of policy is misconduct); Miss. Emp. Sec. Comm'n. v. Percy, 641 So. 2d 1172 (Miss. 1994) (a nurse was terminated for violating the employer's policy requiring that she appropriately complete time sheets).

The case of Miss. Emp. Sec. Comm'n. v. Barnes, 853 So. 2d 153 (Miss. Ct. App. 2003) is instructive. In Barnes, the claimant was discharged for violating a safety rule prohibiting smoking while outside a designated smoking area. Claimant had been progressively disciplined for other safety violations. The Court of Appeals held that the claimant's repeated violation of an employer safety rule after warnings, constituted disqualifying misconduct.

Considering this analogous case, Mr. Pilate's actions also constitute misconduct. Further, in spite of Mr. Pilate's denials, the circumstances and the Employer's witnesses, coupled with documents that are part of MDES record, are sufficient evidence upon which to base a misconduct finding. Further, the Employer representative gave a plausible response to Mr. Pilate's claim that he was laid off due to the economy.

Based on the foregoing, the evidence and law support the Board of Review's decision in this case.

CONCLUSION

There is substantial evidence supporting the Department's finding that Mr. Pilate repeatedly violated the Employer's reasonable safety policy, after warnings, and while on probation. The testimony supports a finding that Mr. Pilate was aware, or should have been aware, that another infraction while on violation would result in his termination. Since he again violated a safety rule afterwards, the record supports a finding of misconduct by the Board of Review, as affirmed by the Circuit Court. Thus, based on the facts, case law and standard of review on appeal, the Court of Appeals should accept the Circuit Court and Board's decisions and affirm.

RESPECTFULLY SUBMITTED, this the 15th day of June, 2011.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

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CERTIFICATE OF SERVICE

I, Albert Bozeman White, Attorney for Appellee, Mississippi Department of Employment Security, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following:

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THIS the 15th day of June, 2011.

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