

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2010-TS-01325

MILTON PILATE

APPELLANT

v.

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND TA OPERATING LLC**

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT MILTON PILATE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, Milton Pilate 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 this Court may evaluate possible disqualification or recusal:

1. Milton Pilate
2. TA Operating, LLC
3. Mississippi Department of Employment Security

COUNSEL FOR APPELLANT

1. Honorable Thomas K. Hudson, Attorney at Law, P. O. Box 16701, Jackson, MS 39236

APPELLANT

1. Milton Pilate, 2480 S. Norrell Road, Bolton, MS 39041

CIRCUIT COURT JUDGE

1. Honorable Jeff Weill, Sr. District 1 Circuit Court Judge, 407 East Pascagoula Street. Jackson, MS 39205

COUNSEL FOR APPELLEE

1. Honorable Leanne F. Brady, Attorney at Law. Mississippi Department of Employment Security. P. O. Box 1699. Jackson, MS 39215

APPELLEES

1. Mississippi Department of Employment Security
2. TA Operating, LLC

RESPECTFULLY SUBMITTED, this the 25th day of March, 2011.

BY: 

Thomas Hudson, Esq.
Attorney for the Appellant

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STATEMENT OF THE ISSUE

1. Whether the Circuit Court erred in affirming the Mississippi Department of Employment Security Board of Review Decision despite the Employer, TA Operating, LLC failure to present substantial evidence that Appellant Milton Pilate committed disqualifying misconduct pursuant to M.C.A. Section 71-5-531 (A)(1)(b).

STATEMENT OF THE CASE

This matter is an appeal from a decision by the Mississippi Department of Employment Security (MDES) Board of Review pursuant to Miss. Code Ann. § 71-5-531. Appellant Milton Pilate (hereinafter referred to as "Appellant") was employed by TA Operating, LLC (hereinafter referred to as "Employer") as a mechanic from June 15, 2003 to April 10, 2009. (R.p. 10) On April 9, 2009, Appellant was charged with operating his company vehicle in an unsafe manner when he was allegedly ran his vehicle over a curb and through the grass. (Id.)

After termination, the Appellant applied for unemployment benefits with MDES. (R.p. 1) The Appellant was denied benefits by MDES and appealed. After two hearings, the matter was brought before the Board of Review on December 17, 2009. The Board of review affirmed the original decision. (R.p. 106-107).

The Appellant appealed to the Hinds County Circuit Court on December 28, 2009. (R.p. 108-120). The Circuit Court affirmed the decision of the Mississippi Department of Employment Security Board of Review on July 27, 2010. (R.p. 18)

The Appellant requests that this Court overturn the decision by The Hinds County Circuit Court Judge The Honorable Swan Yerger, and hold that the Appellant is entitled to unemployment benefits.

STATEMENT OF FACTS

Appellant Milton Pilate was employed by TA Operating, LLC (Employer) as a mechanic from June 15, 2003 to April 9, 2009 when he was discharged. (R.p. 10) The stated reason for discharge was a violation of the Employer's safety policies when he allegedly drove a company vehicle in an unsafe manner. (Id.) The Appellant was on probation at this time for a previous infraction. (R.p. 10) However, a verification of employment document produced by the showed that the Appellant was a part of staff reductions due to economic downfall and sales reduction. (R.p. 8)

The Appellant filed for unemployment benefits with the Mississippi Department of Employment Security. ((R.p. 1) Appellants claim for benefits were denied on May 22, 2009. (R.p. 18)

A telephonic hearing was held on September 21, 2009, conducted by Administrative Law Judge (ALJ) Susan Gibson. (R.p. 25-27, 31-68) The ALJ affirmed the denial of the Appellant's benefits. (R.p. 69)

Appellant appealed to the MDES Board of Review. (R.p. 74) After a review of the record, the Board of Review on November 6, 2009, remanded the matter to the ALJ to obtain additional information. (R.p. 76-77).

A Second hearing occurred on November 23, 2009. (R.p. 78-80, 81-105). After the hearing, the matter was brought before the Board of Review on December 17, 2009. The Board of review affirmed the original decision. (R.p. 106-107).

The Appellant appealed to the Hinds County Circuit Court on December 28, 2009. (R.p. 108-120). The Circuit Court affirmed the decision of the Mississippi Department of Employment Security Board of Review on July 27, 2010. (R.p. 18)

SUMMARY OF THE ARGUMENT

The Circuit Court's decision to affirm the MDES Board of Review's decision to deny the Appellant benefits was improper because the Board of Review's finding was not based on substantial, clear and convincing evidence. In order to justify a finding of misconduct under Mississippi law, an-employee's actions must be willful and wanton, grossly negligent, and an intentional disregard of the employee's duty and the employer's interests. Further, the employer bears the burden of proving by substantial, clear and convincing evidence that the claimant's actions constituted disqualifying misconduct.

In the instant case, Appellant Milton Pilate was terminated for allegedly hitting a curb while operating his company vehicle. Even if true, this action does not rise to the level needed to justify a denial of benefits. Also, the employer failed to present substantial evidence that the Appellant committed such action as alleged by the employer. The alleged incident was witnessed by one employee and no damage was done to the company's vehicle. Further, there is evidence in the record that suggest the Appellant was terminated for economic reasons. Unfortunately, the lower Court failed to consider this evidence in rendering their decision.

The Appellees in this case failed to present substantial, clear and convincing evidence that the Appellant in this case acted with willful, wanton and intentional disregard of the employer's duty and interests in this matter. Further, the lower Court failed to consider evidence of reasons for the Appellant's dismissal outside of the stated reasons by the Employer. Therefore, the order by the lower Court should be overturned.

ARGUMENT

1. Standard of Review. The de novo standard is used when overturning a Board of Review Decision.

The de novo standard of review is used when overturning a Board of Review decision. Mississippi Code Ann. § 71-5-531 states that a Board of Review's findings as to the facts of a

case are to be conclusive "if supported by evidence and in the absence of fraud," and the appellate court's jurisdiction is limited to "questions of law." *Scott v. Miss. Employment Sec. Comm 'n*, 892 So. 2d 291, 292 (Miss. Ct. App. 2004). In an appeal regarding the denial of unemployment benefits, the Board of Review's decision may only be overturned if it is "(1) unsupported by substantial evidence, (2) arbitrary or capricious, (3) beyond the scope of power granted to the agency, or (4) in violation of the employee's constitutional rights." *Id.*; *Miss. Employment Sec. Comm 'n v. Noel*, 712 So. 2d 728, 730 (Miss. Ct. App. 1998); see *Beverly Enters. v. Miss. Div. of Medicaid*, 808 So. 2d 939, 941 (Miss. 2002) (holding that the Mississippi Supreme Court is bound to follow the standard of review used by the circuit or chancery court when reviewing an agency action). An agency decision must be reversed by the Court if the decision violates a party's constitutional or statutory right. *Beverly Enters.*, 808 So. 2d at 941 ; *Trading Post, Inc. v. Miss. Employment Sec. Comm 'n*, 924 So. 2d 634, 635 (Miss. Ct. App. 2006). In an unemployment benefits action, "the employer has the burden of showing by substantial, clear and convincing evidence' that the former employee's" actions warrant a finding of disqualifying misconduct. *City of Clarksdale v. Miss. Employment Sec. Comm 'n*, 699 So. 2d 578, 580 (Miss. 1997); *Foster v. Miss. Employment Sec. Comm 'n*, 632 So. 2d 926, 927 (Miss. 1994). The courts have held that substantial evidence is not a "'mere scintilla' or suspicion," but rather substantial evidence is "' such relevant evidence as reasonable minds might accept as adequate to support a conclusion.'" *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 45 (Miss. 1999). In addition, "if an administrative agency has misapprehended a controlling legal principle," then the reviewing court owes no deference to the agency's decision and the reviewing court will use a de novo standard of review. *Id.* at 5.

II. The Circuit Court's decision to affirm the Board of Review denial of employment benefits violated Mr. Pilate's statutory right to those benefits because the Employer failed to present substantial, clear and convincing evidence that Mr. Pilate's actions constituted misconduct under Mississippi Law.

The courts have held that substantial evidence is something more than a "mere scintilla" or suspicion. It has also "been defined by this Court as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion.'" Further, substantial evidence has been described "as that which provides an adequate basis of fact from which the fact in issue can be reasonably inferred." *Public Employees' Ret. Sys. v. Howard*, 905 So. 2d 1279, 1285 (P16) (Miss. 2005)

Mississippi Code Ann. § 71-5- 513 states that an "individual shall be disqualified for benefits if he was discharged for misconduct connected with his work " *Allen v. Miss. Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994). Mississippi case law has subsequently defined misconduct as:

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 ... [and] 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.

Allen, 639 So. 2d at 907

In the case sub judice, the Employer failed to prove that Appellant engaged in misconduct as defined by the Courts. The Appellant in this case was discharged for allegedly operating his

vehicle in an unsafe manner by driving on the curb. Two Hearings were held in which employer was given opportunity to present facts against the Appellant. The only evidence presented against the appellant was testimony of a single employee, Van Shepard, who testified that he witnessed a truck drive on the curb. (R.p. 91) Merely driving up on a curb does not constitute gross negligence on part of Appellant under the statute. A reasonable and fair-minded observer can in no way classify the Appellant's actions as wanton disregard of the employer's interest. Further, there was no evidence presented of "wrongful intent" or "evil design" as defined by the Court in *Allen*. The Court has stated that "inadvertences and ordinary negligence in isolated incidents . . . are not considered 'misconduct' within the meaning of the statute," and should not justify the denial unemployment benefits. *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). Further, there was no evidence that Appellant's actions caused injury or damage to the vehicle. If Appellant did hit curb, it is entirely possible that he misjudged the right turn as stated in his testimony which caused him to hit the curve. Such action does not constitute willful misconduct or gross negligence. Good faith errors in judgment are considered misconduct. Appellants own testimony showed he was well aware of pending layoffs and his own 90 day probation period for previous incident. (R.p. 61) It is highly unlikely Appellant's conduct in light of such circumstances would constitute willful misconduct under the law.

III. The Circuit Court erred in ignoring evidence that Mr. Pilate was discharged for reasons other than gross misconduct.

Mr. Pilate presented documented evidence at hearing that stated his employment was ending due to "economic downfall and sales, leading to staff reduction". (R.p. 8) The Employer admitted that such language was included in a verification of employment for the Appellant prepared by one of the Employer. (R.p. 60). The Employer also admitted that there were staff reductions at the time of the Appellants discharge due to economic reasons. (Id.) Finally,

employer also admitted to discussion with the Appellant regarding reducing his hours for budgetary reasons prior to his release from employment. (Id.) Despite this testimony, the Circuit Court failed to consider the potential economic reasons for the Appellant's discharge.

In reviewing an administrative decision, the entire record must be reviewed. Contrary Evidence cannot be merely neglected on review. *Menendez-Donis v. Ashcroft*, 360 F.3d 915 The Circuit Court should not have ignored the testimony of the Appellant and documentation presented which showed that the Appellant may have been discharged for reasons other than that which was cited by the Employer. A full review of the record would have resulted in a judgment in favor of the Appellant.

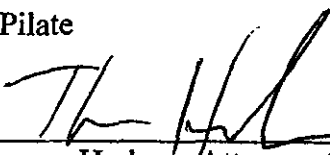
CONCLUSION

The Circuit Court's decision to affirm the Board of Review denial of employment benefits violated Mr. Pilate's statutory right to those benefits because the Employer failed to present substantial, clear and convincing evidence that Mr. Pilate's actions constituted misconduct under Mississippi Law. Further, the Circuit Court erred in ignoring evidence that Mr. Pilate was discharged for reasons other than gross misconduct. For these reasons, the decision of the Hinds County Circuit Court should be overturned by this Honorable Court.

Respectfully submitted,

Milton Pilate

BY:


Thomas Hudson, Attorney for the Appellant

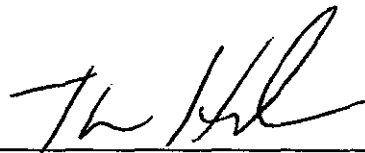
CERTIFICATE OF SERVICE

I, THOMAS HUDSON, Attorney for the Appellant, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Honorable Jeff Weill, Sr.
District 1 Circuit Court Judge
407 East Pascagoula Street
Jackson, MS 39205

Honorable Leanne F. Brady, Attorney at Law
Mississippi Department of Employment Security
P. O. Box 1699
Jackson, MS 39215

THIS, the 14 day of April, 2011.

A handwritten signature in dark ink, appearing to read 'TH HUDSON', is written over a horizontal line.

ATTORNEY FOR THE APPELLANT