

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00051 COA

DIAMONDHEAD DAY CARE, INC.

APPELLANT

v.

THERESA M. WILLSON

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DEREK ARTHUR WYATT

ATTORNEYS FOR APPELLEE:

LUCIEN M. GEX, JR.

RONALD J. ARTIGUES, JR.

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: REVERSED MESC'S DECISION DENYING BENEFITS

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

FRAISER, C.J., FOR THE COURT:

This is an appeal from the decision of the Harrison County Circuit Court reversing the decision of the

Mississippi Employment Security Commission (MESC) and granting benefits to Theresa M. Willson. Appellant, Diamondhead Day Care, Inc. (DDC) asserts the trial court erred, and petitions this Court to reinstate the ruling of the MESC Board of Review. DDC presents the following issue on appeal:

I. THE FACT FINDINGS AND DECISION OF THE HEARING EXAMINER AND BOARD OF REVIEW WERE SUPPORTED BY SUBSTANTIAL EVIDENCE THAT: (A) WILLSON EXHIBITED A HOSTILE AND NEGATIVE ATTITUDE TOWARDS HER EMPLOYER, ANNE CORDOVA; (B) CLAIMANT'S WORK WAS UNSATISFACTORY; AND (C) WILLSON'S BEHAVIOR CONSTITUTED MISCONDUCT.

Willson contends that in addition to the issue stated by DDC, two other issues should be considered by this Court:

I. WHETHER THE EMPLOYER WAS "BAY JOURDAN PUBLISHING COMPANY" OR LUIS CORDOVA, WHO OWNED FIFTY PERCENT OF THE STOCK IN DDC.

II. WHETHER WILLSON WAS GRANTED A FAIR AND IMPARTIAL HEARING.

Willson fails to cite any authority to support her contentions that there was either a dispute as to ownership of the day care center or whether she received a fair hearing. Therefore, we need not consider Willson's issues on appeal. *See Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992) ("[F]ailure to cite any authority in support of these assignments of error precludes this Court from considering these claims on appeal."). After thoroughly reviewing the record, we reverse the decision of the Harrison County Circuit Court and render the cause.

FACTS

Willson worked for two years as assistant director of DDC, a licensed child care facility in Bay St. Louis, Mississippi. DDC was owned and operated by Anne and Luis Cordova until April 15, 1993. Luis and Anne Cordova were subsequently divorced. Anne Cordova (Cordova) sold her fifty percent interest in DDC to Thomas Alfonso, owner/operator of Bay Jourdan Publishing Company. Cordova remained the managing director and sole licensee of the day care facility. On the afternoon of April 16, 1993, Cordova fired Willson for misconduct. The evidence reveals that Willson behaved belligerently and defiantly towards Cordova. Other incidents of misconduct revealed by the evidence include extending credit to customers without authorization, disconnecting a telephone line without authorization, and changing the names of the payee on DDC checks signed by Cordova without authorization. Willson filed a claim for unemployment benefits two days after her termination. After a full hearing on the matter, the appeals referee denied benefits. He made the following findings of fact:

Claimant worked about two and one-half years as assistant director for Diamondhead Day Care, Inc. . . . ending April 16, 1993, at which time she was discharged. Claimant was discharged for her attitude, tardiness, unsatisfactory work and insubordination. Claimant's unauthorized discounts to customers and her unsatisfactory record keeping caused an

estimated financial loss of \$2, 750.00 during the first quarter of 1993. During a monitored telephone conversation with another individual, claimant was disrespectful of her superior. She was aware the phone was monitored. On April 16, 1993, Claimant was discharged after being rude and disrespectful to her superior.

At the hearing, Cordova testified that during the period that she completed bi-yearly employee evaluations, Willson approached her and commented on how hard the employees worked. After Cordova agreed, Willson threatened to tell Luis Cordova that Cordova was seeing someone else. Cordova testified that she felt threatened and intimidated.

Receipts were introduced into evidence at the hearing showing monies owed by customers. Alfonso testified that Willson was responsible for the billing and collection of customers' monies as well as managing the DDC checkbook. Alfonso's testimony revealed that Willson gave unauthorized discounts amounting to \$250.00 in lost revenues. Willson was unable to explain the receipts evidencing the owed monies. Moreover, checks were introduced into evidence that had been signed by Anne Cordova and made out to the IRS but were subsequently changed by Willson to be payable to Luis Cordova. Although Willson denied changing the checks, Cordova positively identified Willson's handwriting. Cordova also testified that Willson made threats to her over the phone. In addition, Willson placed an order resulting in the disconnection of a phone line without Cordova's authorization. Cordova, Willson, and Alfonso were the only witnesses to testify at the hearing.

The appeals referee denied benefits. The MESc Board of Review adopted the findings of the appeals referee and affirmed the decision. The Circuit Court of Harrison County reversed the decision of the MESc and the present appeal ensued.

I. THE FACT FINDINGS AND DECISION OF THE HEARING EXAMINER AND BOARD OF REVIEW WERE SUPPORTED BY SUBSTANTIAL EVIDENCE THAT: (A) WILLSON EXHIBITED A HOSTILE AND NEGATIVE ATTITUDE TOWARDS HER EMPLOYER, ANNE CORDOVA; (B) CLAIMANT'S WORK WAS UNSATISFACTORY; AND (C) WILLSON'S BEHAVIOR CONSTITUTED MISCONDUCT.

Section 71-5-531 of the Mississippi Code in pertinent part provides the standard of review for this Court:

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 (1972); *see also Mississippi Employment Sec. Comm'n v. Percy*, 641 So. 2d 1172, 1174 (Miss. 1994). We interpret this section to require that we affirm the board of review if its findings of fact are supported by substantial evidence and if we further determine that it has not misapplied the law to its findings of fact.

More recently, the Mississippi Supreme Court endorsed the following standard of review of an appeal by the MESAC:

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 Employment Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994) (citations omitted). A comparison of the *Allen* standard of review, to the standard of review in section 71-5-531 of the Mississippi Code, indicates that the standard of review in section 71-5-531 is the appropriate initial standard of review for this Court to employ when it engages in the resolution of issues which confront it in appeals from the MESAC.

First of all, we conclude that the appeals referee's findings of fact, which we previously quoted, were supported by substantial evidence. We next consider whether the commission through its board of review correctly applied the law to the facts found by the appeals referee. The legal issue in this case is whether Willson's actions and behavior toward Cordova as well as her unauthorized and detrimental bookkeeping constituted "misconduct" within the meaning of section 71-5-513(A)(1)(b) of the Mississippi Code. The Mississippi Supreme Court has defined misconduct as:

[C]onduct 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 [S]tatute.

Shannon Eng'g & Constr. Inc. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 448-49 (Miss. 1989).

Willson defended herself at the hearing by claiming she was caught up in the middle of the Cordovas' divorce. While there is no evidence to support such a defense, substantial evidence exists demonstrating Willson's disregard for Cordova's position and authority. Willson left a virtual paper trail attesting to her deliberate violations of expected behavior. The Mississippi Supreme Court has held that falsification of time cards constitutes misconduct. *Mississippi Employment Sec. Comm'n v. Percy*, 641 So. 2d 1172, 1175-76 (Miss. 1994). It follows logically that tampering with DDC checks and unauthorized, deliberate loss of revenue is also misconduct under the statute.

The trial court held that the decision of the hearing officer, adopted and affirmed by the board of review, was not supported by substantial evidence. We disagree. After reviewing the record we are confident that the MESC's decision, determining Willson's actions were misconduct under the provision of section 71-5-513(A)(1)(b) of the 1972 Mississippi Code, was sufficiently undergirded by substantial evidence. We therefore reverse the decision of the Harrison County Circuit Court and reinstate the ruling of the board of review.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS REVERSED AND THE RULING OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION BOARD OF REVIEW IS REINSTATED. COSTS OF APPEAL ARE ASSESSED AGAINST APPELLEE.

BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.