

IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00778 COA

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

APPELLANT

v.

MARGARET M. BRADY

APPELLEE

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

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAN D. GARRICK

ATTORNEY FOR APPELLEE:

MARGARET M. BRADY, PRO SE

NATURE OF THE CASE: UNEMPLOYMENT COMPENSATION

TRIAL COURT DISPOSITION: CIRCUIT COURT REVERSED COMMISSION AND
AWARDED EMPLOYMENT BENEFITS

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Margaret M. Brady, employed by Pickett Industries as a cafeteria worker, was terminated from her position with Pickett on account of insubordination. Brady filed for unemployment benefits with the Mississippi Employment Security Commission (the Commission), which, after a full hearing, determined that Brady was terminated for "misconduct" and disqualified from receiving benefits. The Commission's decision was reversed by the Circuit Court of Rankin County and compensation was reinstated. The Commission now appeals.

FACTS

Brady was a cashier/cook for Pickett Industries, a vending food service in Flowood, Mississippi. Brady's primary responsibilities were at the Excelon Building on Watkins Drive; however, prior to working at the Excelon Building, Brady had been assigned to the Commissary, the place where the sandwiches for the vending machines were made.

Dan Countiss, general manager of Pickett, stated that while Brady's main responsibilities were at the Excelon Building, "[Brady] worked for Pickett Industries" and was required to work wherever management "deemed she's needed that day."

Brady begins work at 5:30 a.m. and normally works an eight hour shift. If she works more than forty hours a week, Brady is paid overtime. On April 10, 1994, at approximately 10:30 a.m., Countiss called Brady at the Excelon Building and told her that there was a shortage of people at the Commissary, and that, in order to meet the needs of their customers, Brady needed to leave work at the Excelon Building and report to work at the Commissary. Countiss told Brady that he only needed her to work for a couple of hours and that this was not a permanent assignment. It is approximately a fifteen-minute drive from the Excelon Building to the Commissary.

Countiss testified that the week before he had told Brady that he needed her to go work at the Commissary, but had given her the choice of accepting or refusing the assignment because she had already worked eight hours that day. However, on this occasion he told Brady that she *had* to report to work at the Commissary and that if she refused to report there, "I will consider this insubordination and you can be disciplined up to and including discharge."

Brady called Countiss back approximately one hour later and asked him whether she was going to be fired if she did not go over to the Commissary. Brady told Countiss that she did not want to go to work over there because she did not get along with the Commissary's manager. Countiss responded that the manager she disliked was not there that day, so she did not have to worry about working around him.

Countiss reiterated his demand that she report to work at the Commissary and stated that if she did not show up at the Commissary then she "could consider [her] employment terminated." Brady failed to report to work at the Commissary, and her employment with Pickett Industries was terminated.

Brady subsequently filed for unemployment benefits with the Commission. The hearing officer who conducted the evidentiary hearing made the following findings of fact:

The claimant was employed from July 24, 1989, until April 10, 1994, as a cashier and

cook with Pickett Industries, a vending food service, Flowood, MS. She was discharged on the latter date for insubordination. The claimant had been working at a job site on Watkins Dr. the morning of her last day of work. The claimant was called by the General Manager and instructed to go to the Commissary in Flowood, where they were short staffed and needed additional personnel to prepare and package sandwiches for the next day's business. She refused to go because she did not like working with the other Manager. The claimant had worked at the Commissary in the past although a week earlier she had refused to help out when the General Manager allowed her to make a choice and she chose not to go. On April 10, 1994, the claimant was not given a choice. She was told that her refusal to go would be considered insubordination and a termination offense. The claimant's Supervisor at the Watkins Street address urged the claimant to do as instructed because she did not want to lose a good employee. The claimant did not go to the other site and was terminated.

The hearing officer determined that Brady's "discharge for insubordination is supported by the evidence and justifies a disqualification for benefits." The hearing officer's findings of fact and ruling were affirmed by the full board of review. Brady appealed that determination to circuit court which ruled that the Commission had erred in disallowing Brady's claim for benefits.

DISCUSSION

We note at the outset that Brady has not filed any briefs or any type of response to the arguments made by the Commission. As our supreme court has stated on many different occasions the failure of the appellee to file a responsive brief is tantamount to a confession of error. *Snow Lake Shores Proerty Owners Corp. v. Smith*, 610 So. 2d 357, 361 (Miss. 1992). However, because Brady is obviously *pro se* we do not find that Brady has confessed error and will address the merits of the case.

In most cases concerning unemployment benefits our standard of review is limited to questions of law. *Barnett v. Mississippi Employment Sec. Comm'n*, 583 So. 2d 193, 195 (Miss. 1991). Section 71-5-531 (1972) states:

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 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).

In this case, the findings of the Commission are supported by substantial evidence and are conclusive. Therefore, the question presented before this Court is purely a legal one. Does Brady's refusal to work constitute "misconduct" within the meaning of section 71-5-513A(1)(b) so as to disqualify her from receiving unemployment benefits? Our answer to that question is that it does constitute

"misconduct," and therefore, Brady is not entitled to compensation.

Section 71-5-513A(1)(b) states that a person will be disqualified for unemployment compensation if he was discharged for "misconduct" connected with the work. Misconduct has been defined 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." *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982).

Furthermore, in *Shannon Engineering & Construction, Inc. v. Mississippi Employment Sec. Comm'n*, 549 So. 2d 446, 449 (Miss. 1989), the Mississippi Supreme Court determined that "insubordination" is included within the scope of "misconduct." The court defined "insubordination" as "[a] 'constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.'" *Id.*

In the case *sub judice* Brady was warned that if she did not report to work at the Commissary she would be terminated for insubordination. This was not the first time that Brady had refused to work at the Commissary, and on this occasion she was told that she did not have a choice in the matter; she had to go to the Commissary. Approximately one hour later, Countiss again told Brady that she needed to report to work at the Commissary and that if she refused to report to work there, she could consider her job terminated. Brady was told, on two separate occasions that she had to go to the Commissary, and each time she refused.

Our supreme court has held that an employee can disobey an order of his supervisor and it not be deemed to constitute misconduct "if a reasonably prudent person under the circumstances would believe the danger [of following the instructions] was so grave that there exists a real danger of death or serious physical injury; and if the employee has no reasonable alternative." *Mississippi Employment Sec. Comm'n v. Phillips*, 562 So. 2d 115, 118 (Miss. 1990). Our supreme court has not addressed the situation where an employee refuses work based upon the fact that the task requested was outside the scope of his/her employment, or outside of his/her training or experience. The refusal to work under such circumstances might be reasonable; however, in this case we need not address the point because Brady put forth no evidence that Countiss' instruction to work at the Commissary was unreasonable, that it was outside the scope of her employment, that it was outside her training and experience, or that it was detrimental to her well being.

A person is entitled to receive unemployment benefits if that person is "unemployed through no fault of their own." Miss. Code Ann. § 71-5-3 (1972). Unemployment compensation "is not to be used to reward those who, for reasons of their own, refuse to work at suitable employment." *Mississippi Employment Sec. Comm'n v. Fortenberry*, 193 So. 2d 142, 144 (Miss. 1966). Clearly, Brady is not unemployed through "no fault of her own." In this case, the only reason Brady is unemployed is because she *chose* not to follow her supervisor's order.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY IS REVERSED AND RENDERED. COSTS ARE TAXED TO THE APPELLEE.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE,

AND SOUTHWICK, JJ., CONCUR.