IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00489 COA

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION APPELLANT

v.

TAMRA L. UPCHURCH APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: MARSHALL COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JAN GARRICK

ATTORNEY FOR APPELLEE: NO BRIEF FILED FOR APPELLEE

NATURE OF THE CASE: DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS

TRIAL COURT DISPOSITION: TRIAL COURT REVERSED COMMISSION DENIAL OF UNEMPLOYMENT BENEFITS

MANDATE ISSUED: 8/5/97

EN BANC.

McMILLIN, P.J., FOR THE COURT:

The issue before the Court today involves the question of whether an employee's recurring tardiness in reporting for work can rise to the level of misconduct sufficient to deny the employee's entitlement to unemployment compensation benefits. The Mississippi Employment Security Commission Board of Review, adopting *en toto* the findings and conclusions of the Appeals Referee, determined that, in this case, the employee's persistent lateness in the face of warnings and escalating disciplinary actions constituted disqualifying misconduct. On appeal, the Circuit Court of Marshall County reversed the Board and awarded benefits to the employee, Tamra L. Upchurch. The commission perfected this appeal.

I.

Facts

Upchurch was employed as a fork lift driver and inventory cycle counter with a company known as E. D. Smith. She worked for the company a total of nine months before she was terminated on August 18, 1995. The proof shows that Upchurch began to be tardy for work in July. The testimony at the hearing before the Appeals Referee by the employer's representative is something less than a model of clarity, either because of the witness's confusion or because of errors in the transcription of the testimony. However, it does appear with some measure of certainty that the following is a chronology of events: Upchurch was two minutes late for work on July 11, three minutes late on July 12, seven minutes late on July 13, and six minutes late on July 14. As a result, under published company policy, she was given a verbal warning concerning excess tardies. She was tardy to an unknown degree on July 24 and was given a written warning of the consequences of her continued tardiness on August 1. She was late again on August 3, though the record does not reflect how late. This resulted, under company policy, in her receiving a two-day suspension from work. This penalty was carried out on August 14 and 15. Upchurch was late yet again on August 18, whereupon she was terminated.

Upchurch claims that her tardiness was not due to disregard for her duties as an employee of E. D. Smith. Rather, she claims that her problems arose when she took in two nieces to live with her. Upchurch claimed that the girls had been faced with institutionalization, had she not agreed for them to come live with her. She testified that her attendance record had been satisfactory prior to this change in her family situation. She said that she was late because she was responsible for seeing that

the nieces got onto the school bus, and that, when the bus was late, as it apparently often was, she was correspondingly late for work, despite "speeding" to work to try to avoid or minimize her tardiness. She claimed that she had sought, without success, to obtain a modification in her work schedule to accommodate this new family responsibility.

This testimony by Upchurch was not contradicted by any other evidence. Neither is there any indication that the Appeals Referee found her testimony implausible or unworthy of belief. To the contrary, he appeared, for purposes of his opinion, to have accepted the truth of her representations. In reaching the conclusion that he did, he relied on the fact that the company had a published policy stressing the importance of timely reporting to work and outlining the increasingly severe penalties that would accompany recurring tardiness up to termination. He concluded that an employer "does have the right to expect regular and on time attendance from its employees," and that Upchurch's persistent incidents of lateness constituted "misconduct" within the meaning of section 71-5-513A(1)(b) of the Mississippi Code. *See* Miss. Code Ann. § 71-5-513A(1)(b) (1972).

II.

Discussion

We find ourselves faced with two applicable legal principles that tug in opposing directions. First is the notion that a court reviewing the action of an administrative agency has limited authority to intervene and is obligated to affirm where there is substantial evidence to support the agency's decision. *Coleman v. Mississippi Emp. Sec. Comm'n,* 662 So. 2d 626, 627 (Miss. 1995). On the other hand, we acknowledge the relatively heavy burden of proof imposed on an employer seeking to deny a former employee's right to unemployment benefits based on discharge for misconduct. The law states that the burden is by "substantial, clear and convincing evidence." *Shannon Eng'g & Constr. , Inc. v. Mississippi Emp. Sec. Comm'n,* 549 So. 2d 446, 450 (Miss. 1989).

The traditional definition of "misconduct" for purposes of our consideration today is found in the case of *Wheeler v. Arriola,* where the supreme court said:

[T]he 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 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 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 statute.

Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982).

The supreme court, in considering a case on somewhat similar facts, sustained the circuit court's decision to reverse the commission where the commission had denied benefits. *See Mississippi Emp. Sec. Comm'n v. Bell*, 584 So. 2d 1270 (Miss. 1991). In that case, Bell was discharged for repeated absences (the employer counted two tardies the same as one absence and most, if not all of Bell's 'absences' were, in fact, dual 'tardies'). *Bell*, 584 So. 2d at 1272. Bell claimed that her attendance problems only arose from her inability to find reliable transportation for her children to get to school before she reported for work at the appointed hour of 7:00 a.m. *Id* at 1273. Bell had apparently worked the third shift for a number of years without attendance problems, but had been assigned to the first shift when the third shift was eliminated. *Id.* The supreme court found that Bell was "a victim of circumstances," and that her conduct, driven by the need to meet her family obligations, did not evidence such a wilful and wanton disregard of her employer's interest as to constitute disqualifying misconduct. *Id.* at 1274.

There is nothing in this case that would distinguish the facts significantly from those in the *Bell* case. Upchurch's testimony that her attendance record prior to the arrival of her nieces was exemplary is not disputed. In each recorded instance, her tardiness measured less than ten minutes. She testified without contradiction that these incidents were due to unavoidable commitments to her family that did not exist at the time she took the job and were not the product of a wilful disregard of her obligation as an employee. While we agree that excessive tardiness, no matter how understandable, may constitute a legitimate basis to terminate an employee, we do not agree that in every instance, such excessive tardiness rises to the level of "misconduct" sufficient to meet the high burden imposed on an employer seeking to disqualify the erstwhile employee from unemployment compensation.

In this case, we conclude that, under the rationale of *Bell*, the Appeals Board was manifestly in error in concluding that Upchurch's tardiness constituted misconduct of sufficient gravity to disqualify her from unemployment benefits. The circuit court was correct in overturning the order of the Appeals Board and we, therefore, affirm the circuit court.

THE JUDGMENT OF THE MARSHALL COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.