IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00523 COA

LATHEN L. HARTFIELD

APPELLANT

v.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: STONE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JEREMY DAVID EISLER

ATTORNEYS FOR APPELLEE:

MARK D. RAY

ALBERT B. WHITE

NATURE OF THE CASE: CIVIL-SUIT FOR UNEMPLOYMENT BENEFITS

TRIAL COURT DISPOSITION: UNEMPLOYMENT BENEFITS DENIED

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

The appellant, Lathen L. Hartfield, was denied unemployment benefits by the Mississippi Employment Security Commission (hereinafter MESC) after having been terminated by his employer, Trinity Marine, for excessive absenteeism. He argues three points of error on appeal. Finding all of his issues without merit, we affirm.

FACTS

Lathen L. Hartfield was employed by Trinity Marine as a pipefitter from May 30, 1994, until January 10, 1995. On October 3, 1994, Trinity Marine issued the appellant a written warning for excessive absenteeism. The first warning resulted from multiple absences and tardiness between May 30, 1994, and October 3, 1994. Since June 1994, appellant had been absent from work without notifying his employer on two (2) days; he had been late for work on nine (9) days; and he had received seven (7) excused absences. These absences were in addition to eight (8) days for which appellant provided doctors' excuses. Thus, within appellant's first four (4) months of employment, he had accumulated seventeen (17) absences and nine (9) tardies.

On November 8, 1994, appellant received a second written warning. He was cited for having missed one (1) complete day and three (3) partial days, and for having been tardy on two (2) days. On December 9, 1994, appellant received a third written warning for having missed three (3) full days and two (2) partial days of work and for being late three (3) times--all within one month of his second warning on November 8. At this time, appellant was told that no further warnings would be given and that one more occurrence would result in termination.

Following this third and final warning, appellant was late for work on three (3) days and was absent on two (2) days, although appellant did notify his employer on these two days that he would be absent. On January 10, 1995, appellant did not report to work and did not call in. Thus, Trinity Marine discharged appellant for excessive absenteeism on January 10, 1995. Subsequently, the MESC Board of Review disqualified the appellant from receiving unemployment benefits.

DISCUSSION

The appellant alleges three points of error. In summary form, these arguments deal with whether excessive absenteeism and failure to notify the employer of the reason for an employee's absences can constitute misconduct, and furthermore, whether an employer's lack of a specific policy concerning excessive absenteeism can qualify the errant employee for misconduct under the statute. We will group the arguments for discussion purposes.

An individual is disqualified from receiving unemployment benefits for misconduct connected with his work. Miss. Code Ann. § 71-5-513(A)(1)(b) (1972). However, the appellant argues that his absenteeism was the result of medical problems he suffered, which he claims is insufficient grounds to constitute misconduct.

In the Mississippi Supreme Court case of *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (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 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 statute.

The MESC adopted the *Wheeler* definition as Part V, Section 1720 of its Administrative Manual and went on to add that "[a]n employee shall not be found guilty of misconduct for the violation of a rule unless: (1) [t]he employee knew or should have known of the rule; (2) [t]he rule was lawful and reasonably related to the job environment and job performance; and (3) [t]he rule is fairly and consistently enforced."

In *Barnett v. Mississippi Employment Sec. Comm'n*, 583 So. 2d 193, 194 (Miss. 1991), the claimant had missed fifteen days of work in less than four months when he was warned by his supervisor that such absenteeism would not be tolerated. Shortly after his warning, the claimant failed to report to work or to notify his employer on two days. The claimant then reported to the employer's office to pick up his paycheck. The following day, when the claimant reported to work, he was discharged for absenteeism. *Id.*

Much like the facts in *Barnett*, the appellant in the case before us missed an excessive amount of work, oftentimes without notifying his employer that he was planning to be absent. Although he did provide doctors' excuses for some of his absences, there were many times in which the appellant failed to provide any explanation for his absence or tardiness. "Misconduct imports conduct that reasonable and fair-minded external observers would consider a wanton disregard of the employer's legitimate interests." *Id.* at 196 (quoting *Mississippi Employment Sec. Comm'n v. Phillips*, 562 So. 2d 115, 118 (Miss. 1990). While we recognize that excessive absenteeism does not qualify as misconduct in all circumstances, *Barnett*, 583 So. 2d at 196, nevertheless, we hold in this case that the appellant Hartfield's minimal efforts to contact his employer, after having missed an excessive amount of work and after having received numerous written warnings, were so unreasonable as to constitute "misconduct."

The appellant further argues that where the employer has no general rule regarding excessive absenteeism and handles such occurrences on a case by case basis, then the employer is barred from invoking excessive absenteeism as a basis for denial of the employee's claim for unemployment benefits. The appellant argues that the third prong of the MESC Administrative Manual Part V, Section 1720, requiring that the rule be "fairly and consistently enforced" is violated where an employee is denied benefits when the employer has no specific policy regarding absenteeism.

The supreme court has stated that "[a]n employer has the right to expect an employee to report for work as scheduled on a regular and timely basis and to give proper notification when absent." *Mississippi Employment Sec. Comm'n v. Bell*, 584 So. 2d 1270, 1271 (Miss. 1991). The fact that Trinity Marine had no general rule regarding excessive absenteeism does not authorize its employees to report to work whenever they so choose and then to hide behind the shield of the third prong of the Manual. It is only fair to assume that excessive absenteeism might very well lead to discharge of one's employment, regardless of whether or not a specific absence policy is in place.

Section 71-5-531, Miss. Code Ann. (1972) provides: "In any judicial proceeding 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." The evidence in this case clearly shows that the appellant's actions caused his termination from Trinity Marine. The appellant's failure to notify his employer of absences after repeated warnings, coupled with his record of excessive absenteeism, provided sufficient evidence for the Board's finding that the appellant's actions constituted misconduct under the statute.

THE JUDGMENT OF THE STONE COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

BRIDGES, C.J., AND McMILLIN, P.J., COLEMAN, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., AND HINKEBEIN, J., NOT PARTICIPATING.