IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CC-01325-COA

MILTON PILATE **APPELLANT**

v.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY **APPELLEE**

DATE OF JUDGMENT:	07/27/2010
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	THOMAS KELVIN HUDSON
ATTORNEY FOR APPELLEE:	ALBERT B. WHITE
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	CIRCUIT COURT AFFIRMED MDES'S DECISION TO DENY UNEMPLOYMENT BENEFITS
DISPOSITION:	AFFIRMED - 03/27/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. Milton Pilate appeals the Hinds County Circuit Court's judgment, which affirmed the Mississippi Department of Employment Security (MDES) Board of Review's denial of his request for unemployment benefits. Because substantial evidence supports the MDES Board of Review's decision that Pilate deliberately violated company policy and was, therefore, disqualified from receiving unemployment benefits, we affirm.

FACTS

¶2. Pilate had been employed by TA Operating (TA) as a mechanic for approximately

fifteen months before he was discharged. TA had already placed Pilate on ninety days' probation for violating TA's safety policies because Pilate had allowed a TA customer to use a blow torch to work on his personal vehicle in the company shop.

¶3. Pilate had been warned that any other infraction within the ninety-day probationary period, no matter how minor, would result in his immediate discharge. Pilate acknowledged he knew he could be terminated during this probationary period, testifying "that's the very reason I was very careful to walk on eggshells for ninety days to make sure I didn't do anything wrong, and didn't violate any of their rules, because I wanted to keep my job." But, according to TA, Pilate was not careful and again violated TA's safety policy during his probationary period—this time by driving a company truck in an unsafe manner.

¶4. The specific violation resulted from an alleged intentional act where Pilate drove a company service truck onto the curb and grass beside a parking lot to attempt to circumvent the company's machine-operated gate system. Pilate could have used his access card to lift the gate or used the gate's call button. Instead, according to TA's general manager, Todd Avery, Pilate posed a danger to himself and the company vehicle by not following the road, almost hitting a pole while trying to go over the curb. One of TA's field managers witnessed the incident and reported it to Avery. Pilate testified he accidentally scraped the curb but did not jump it.

¶5. The administrative law judge (ALJ) found Pilate had been discharged for operating a company vehicle in an unsafe manner. Thus, Pilate was disqualified from receiving unemployment benefits. After reviewing the record, the MDES Board of Review affirmed

the ALJ's decision, adopting the ALJ's findings of fact. The circuit court affirmed the MDES Board of Review's decision. And Pilate timely appealed from the circuit court.

STANDARD OF REVIEW

¶6. "[J]udicial review of a Board of Review's ruling is limited." *Booth v. Miss. Employment Sec. Comm'n*, 588 So. 2d 422, 424 (Miss. 1991). "[T]he 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 (Rev. 2011). Thus, we give great deference to an administrative agency's findings and decisions. *Allen v. Miss. Employment Sec. Comm'n,* 639 So. 2d 904, 906 (Miss. 1994). And we must affirm if the decision is supported by substantial evidence. *Reeves v. Miss. Employment Sec. Comm'n,* 806 So. 2d 1178, 1179 (¶5) (Miss. Ct. App. 2002).

¶7. Our limited inquiry requires that we "not reweigh the facts of the case or insert [our] judgment for that of the agency." *Allen*, 639 So. 2d at 906. We will reverse an agency's decision only when it (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 a person's constitutional rights. *Id.*

DISCUSSION

¶8. Where an employee has been previously disciplined according to the employer's policy and given a final warning, a subsequent violation constitutes misconduct. *Miss. Employment Sec. Comm'n v. Barnes,* 853 So. 2d 153, 157 (¶17) (Miss. Ct. App. 2003). Here,

Pilate was so warned.

¶9. Mississippi statutory law provides that "an individual shall be disqualified for [unemployment] benefits . . . for misconduct connected with his work if so found by the department." Miss. Code Ann. § 71-5-513(A)(1)(b) (Rev. 2011). In *Wheeler v. Arriola,* 408 So. 2d 1381, 1383 (Miss. 1982), the Mississippi Supreme Court addressed the meaning of the term "misconduct," as it applies to our unemployment-compensation statute. Misconduct is "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." *Id.* (citing *Boynton Cab Co. v. Neubeck*, 296 N.W. 636 (Wis. 1941)). Misconduct includes "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[.]" *Id.* But "[m]ere 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 [are] not considered 'misconduct' within the meaning of the statute." *Id.*

¶10. The MDES neither found nor does the record support mere inefficiency or isolated negligence on Pilate's part. Rather, MDES found, because Pilate was aware a second safety violation while on probation was grounds for immediate termination, Pilate's "actions in having another safety violation while on probation for a prior violation shows a willful and wanton disregard of the employer[']s interest and constitute misconduct connected with

work."

¶11. Pilate disputes TA's claim that he was discharged for "misconduct." He argues the actual reason for his termination was due to staff cuts or a reduction in work force. Pilate relies on an employment verification form that listed staff reduction as the reason his employment ended. Pilate testified Avery told him TA could not afford to pay him. Avery testified he never told Pilate TA was discharging him as part of a staff reduction. While TA did cut some hourly workers at the time of Pilate's discharge, these cuts did not apply to commissioned employees, like Pilate. Avery further testified the TA staff member filling out the employment-verification form should have looked at the personnel-action form, which clearly states Pilate was terminated for unsafe driving, and that the staff member did not have the authority to deviate from this reason on the employment verification form.

¶12. Presented with Avery's testimony and the personnel-action form as well as Pilate's ulterior-motive theory and employment verification form, MDES found Avery's testimony to be credible and that Pilate was discharged for misconduct. It is not for this court to re-weigh this evidence on appeal or inject our own judgment for the agency's. *Allen*, 639 So. 2d at 906.

¶13. We find MDES's decision and reasoning is supported by substantial evidence and was neither "arbitrary" nor depended on its will alone. *Wright v. Pub. Employees Ret. Sys.*, 24 So. 3d 382, 388 (¶29) (Miss. Ct. App. 2009) (citing *Pub. Employees Ret. Sys. v. Marquez*, 774 So. 2d 421, 429 (¶34) (Miss. 2000)). Thus, we affirm.

¶14. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS**

AFFIRMED.

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS, CARLTON AND FAIR, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY RUSSELL, J.

IRVING, P.J., DISSENTING:

¶15. The majority finds that MDES's decision to deny Pilate unemployment benefits based on "misconduct" was supported by substantial evidence. Based on my review of the record, TA failed to meet its burden of proving misconduct by "substantial, clear and convincing evidence." While TA's general manager attempted to explain the conflicting reasons given for Pilate's termination, his testimony was, at best, self-serving and arguably pretextual, as it would enable TA to avoid an unemployment-compensation claim. I cannot accept that under such circumstances, TA proved by clear and convincing evidence that it terminated Pilate for misconduct. Therefore, I dissent. I would reverse and render the decision of MDES and the order of the circuit court affirming that decision and remand this case to MDES for a determination of and an award of unemployment-compensation benefits.

¶16. At the September 21, 2009 hearing before the ALJ, Pilate testified that he scraped–but did not jump–a curb in the company vehicle. Pilate further testified that his termination was related to decreased business and TA's efforts to reduce its payroll expense. In support of his claim, Pilate pointed to the Employment Verification Form completed by TA, which lists the reason for termination as "due to economic downfall and sales had to do staff reduction."

¶17. TA's general manager, Avery, admitted that there had been reductions in hourly workers at the time that Pilate was terminated. However, Avery explained that Pilate worked

on commission and no commissioned employees were released. Additionally, Avery pointed to TA's Personnel Action Form, which listed the reason for Pilate's termination as "failure to maintain company equipment" and described the incident with the company vehicle where Pilate allegedly jumped a curb.

¶18. When questioned regarding the conflicting reasons for termination listed on the Employment Verification Form and the Personnel Action Form, Avery initially testified that the Employment Verification Forms are completed by a "third[-]party company." However, the form contained in the record is signed as being completed by Qwanda Anderson, TA's on-site bookkeeper. Later on, Avery testified that Anderson was the "back-up bookkeeper" and was still in training at the time that the form was completed. He further explained that generally the Personnel Action Form is given to the bookkeeper, who then uses it to complete the Employment Verification Form.

¶19. On September 23, 2009, the ALJ rendered her decision affirming the denial of benefits. Pilate appealed to the MDES Board of Review, which remanded the case to the ALJ and requested that additional testimony be taken. Specifically, the Board requested testimony from Van Sheppard, a TA employee who allegedly witnessed Pilate jump a curb in the company vehicle.

¶20. On November 23, 2009, the ALJ held a second hearing. Sheppard testified that he had witnessed *someone* drive a company truck over a curb to avoid the parking gate. Sheppard then notified Avery that he had witnessed someone driving in an unsafe manner. Sheppard admitted that he did not recognize the driver. Avery explained that when Sheppard reported

the incident, Avery pulled work orders to determine which mechanic was driving. According to Avery, at the time that the incident occurred, Pilate was the only mechanic out on a work order in a company vehicle. When asked whether Pilate admitted to jumping a curb to avoid the parking gate, Avery testified that he could not recall.

¶21. The employer carries the burden of proving misconduct by "substantial, clear and convincing evidence." *Miss. Employment Sec. Comm'n v. Johnson*, 9 So. 3d 1170, 1173 (¶8) (Miss. Ct. App. 2009) (quoting *Ferrill v. Miss. Employment Sec. Comm'n*, 642 So. 2d 933, 936 (Miss. 1994)). In my judgment, TA failed to meet its burden. Specifically, TA did not provide an adequate explanation for the conflicting reasons for Pilate's termination. The Personnel Action Form lists the basis for termination as "failure to maintain company equipment"; however, the Employment Verification Form lists the reason for termination as "due to economic downfall and sales had to do staff reduction."

¶22. When asked to explain the discrepancy, Avery initially testified that the Employment Verification Form is sent to a third party for completion; however, he later testified that the on-site bookkeeper, who was new to her job, had erroneously prepared the form. While Avery contended that Pilate was not terminated to reduce payroll expenses, he admitted "getting on to" Pilate for his overtime hours and reducing hourly staff at the same time that Pilate was terminated. Given these facts, I am not persuaded that TA's decision to terminate Pilate for "misconduct" was not pretextual. Other jurisdictions have recognized that because "an employer's contribution to the unemployment[-]compensation fund is affected by the claims experience of its employees," an employer has an incentive to "characterize a

termination as based on misconduct" to avoid a claim. *Morris v. U.S. Envtl. Prot. Agency*, 975 A.2d 176, 182 n.5 (D.C. 2009).

¶23. Furthermore, "the question of whether an employee committed misconduct must be resolved with reference to the [unemployment-compensation statute's] purpose, which is to protect employees against economic dependency caused by temporary unemployment." *Id.* at 181 (quoting *Chase v. D.C. Dep't of Employment Servs*., 804 A.2d 1119, 1123 (D.C. 2004)). Additionally, given the remedial nature of the unemployment-compensation statute, "its provisions must be liberally and broadly construed." *Id.* (citation omitted). *See also Nevettie v. Wal-Mart Assoc., Inc.*, 331 S.W.3d 723, 727 (Mo. Ct. App. 2011) (explaining that the term "'misconduct' should not be so literally construed as to effect a forfeiture of benefits by an employee except in clear instances").

¶24. Given the beneficent purpose of the unemployment-compensation statute, doubtful cases, such as Pilate's, should be resolved in favor of the employee seeking benefits. Therefore, I believe that the MDES erred in denying Pilate unemployment benefits.

¶25. For the above reasons, I dissent.

RUSSELL, J., JOINS THIS SEPARATE WRITTEN OPINION.