IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 1999-CC-01638-COA

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION **APPELLANT**

v.

BOBBIE F. BERRY AND ROSE M. BERRY **APPELLEES**

DATE OF JUDGMENT:	09/03/1999
TRIAL JUDGE:	HON. ISADORE W. PATRICK JR.
COURT FROM WHICH APPEALED:	SHARKEY COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN WESLEY GARRETT JR.
ATTORNEY FOR APPELLEES:	NO BRIEF FILED FOR APPELLEES
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	FINDING OF BOARD OF REVIEW THAT THE APPELLEES WERE GUILTY OF MISCONDUCT REVERSED BY THE CIRCUIT COURT.
DISPOSITION:	REVERSED, REMANDED AND REINSTATED 1/16/01
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/6/2001

EN BANC.

McMILLIN, C. J., FOR THE COURT:

¶1. This is an appeal from a decision of the Board of Review of the Mississippi Employment Security Commission to deny unemployment benefits to Bobbie F. Berry and Rose M. Berry. The Berrys appealed first to the Circuit Court of Sharkey County. That court reversed the decision of the Commission acting through its Board of Review and ordered benefits to commence for both claimants. The Commission perfected this appeal. The Commission urges this Court to find that the circuit court incorrectly concluded that there was not substantial evidence to support the Commission's findings of fact regarding the claimants' knowledge of a no-strike provision in the collective bargaining agreement under which they were working. The Commission also contends that the circuit court applied an incorrect legal standard in determining whether the Berrys' activities constituted disqualifying misconduct under the relevant statute and interpreting case law.

¶2. We conclude that the Commission's position has merit and we, therefore, reverse and render the judgment of the circuit court.

I. FACTS

¶3. Freshwater Farms is a catfish processing plant employing approximately two-hundred twenty people.

After an employee strike in May of 1998, Freshwater Farms and the workers' union entered into a collective bargaining agreement. That agreement established a procedure for handling employee grievances and stated that the union would not authorize or encourage strikes. Under the explicit terms of the agreement, any employee who participated in an unauthorized strike would be subject to immediate discharge. On several occasions between May and November, the employees in the plant utilized these grievance procedures.

¶4. On November 16, 1998, approximately sixty-five Freshwater Farms employees, including the appellees, Rose Berry and Bobbie Berry, did not report to work for their scheduled shifts. Instead, the employees conducted an unauthorized strike outside the Freshwater Farms plant in protest of the working conditions that they found objectionable. The employees had not undertaken to resolve their dissatisfaction through the contracted-for grievance procedure prior to the strike. The employees who participated in the unauthorized strike, including specifically the appellees, were dismissed.

¶5. The appellees filed for unemployment compensation after their discharge. The claims examiner determined that they had been discharged for misconduct related to their employment and were disqualified from receiving unemployment benefits under Miss. Code Ann. § 71-5-513 (Rev. 1995). The appellees appealed the decision and a referee affirmed the decision of the claims examiner. The appellees then appealed the referee's decision to the Board of Review. The Board of Review affirmed the decision of the referee. The appellees then appealed to the Sharkey County Circuit Court.

¶6. The circuit court reversed the Board of Review's decision. In a finding of fact that was directly contrary to the Board of Review's factual findings, the circuit court held that the Berrys did not have actual knowledge of the no-strike provision in the collective bargaining agreement. For that reason, the circuit court did not consider the Berrys' failure to report to work as disqualifying misconduct, but rather found it to be a single incident of insubordination that would not interfere with their eligibility for unemployment compensation.

PRELIMINARY NOTE

¶7. The appellees have failed to file a brief in the matter now before this court. There is authority for the proposition that such a failure can be taken as a confession of error if the Court cannot confidently say that there was no error in the circuit court's decision. *Mississippi Employment Security Commission v. Pennington*, 724 So.2d 954, 956 (Miss. Ct. App. 1998) (Citing *Snow Lake Shores Property Owners Association v. Smith*, 610 So. 2d 357, 360 (Miss. 1992); *Queen v. Queen*, 551 So. 2d 197, 199 (Miss. 1989); *Sparkman v. Sparkman*, 441 So.2d 1361, 1362 (Miss. 1983); *Burt v. Duckworth*, 206 So. 2d 850, 853 (Miss. 1968)). However, despite the Berrys' failure to file a brief, we observe that there is a presumption of correctness that attaches to a lower court's decision. *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973). For that reason, we have undertaken a review of the matter on the merits rather than summarily take the Berrys' inaction as confession of error.

LAW AND ANALYSIS

I. WHETHER THE CIRCUIT COURT CORRECTLY DECIDED THAT THE BOARD OF REVIEW'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

¶8. We are obligated to give deference to the findings and conclusions of an administrative agency. Judicial

review of an Employment Security Commission ruling is limited to determination of whether the decision is supported by substantial evidence. If the Board's factual findings are supported by evidence, our review is confined to questions of law. Miss. Code Ann. § 71-5-531 (Rev. 1995). This Court must review the record to determine whether there is substantial evidence to support the Board of Review's finding of fact and whether, as a matter of law, the employees' actions constituted misconduct disqualifying them from eligibility for unemployment compensation. *City of Clarksdale v. Mississippi Employment Sec. Comm'n*, 699 So. 2d 578, 580 (Miss. 1997). A court sitting in an appellate role may not reweigh the evidence to determine where it believes the preponderance of the evidence to lie, nor may it substitute its judgment for that of the agency. *Allen v. Mississippi Employment Sec. Comm'n*, 639 So.2d 904, 906 (Miss. 1994).

¶9. In this instance, we conclude that the circuit court erred in altering certain of the critical findings of fact by the Commission. The Commission found as fact that the appellees were aware of the contents of the collective bargaining agreement. That finding was supported by the employees' own testimony that they had followed the grievance procedures in the past, but chose not to do so in this instance. The evidence in this record supports a conclusion that the employees deliberately disregarded the terms of the collective bargaining agreement by declining to follow established grievance procedures and, instead, participating in an unauthorized strike at a time when they were required, under the terms of their employment, to be on duty in the plant.

II. WHETHER THE CIRCUIT COURT PROPERLY APPLIED THE LAW TO THE FACTS.

¶10. This Court is obligated to apply the definition of misconduct set out in *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982) as follows: "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." The Mississippi Employment Security Commission has also adopted the *Wheeler* definition as part of its administrative manual and added that "an employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced."

¶11. In *Halbert v. City of Columbus*, 722 So. 2d 522 (Miss. 1998), the employee knew of the company policy requiring employees to submit to random drug testing, yet the employee refused. The Court found that this refusal was evidence of wilful, wanton disregard of the employer's interests, citing, among other authorities, *Richardson v. Mississippi Employment Security Commission*, 593 So. 2d 31 (Miss. 1992) and *Moore v. Unemployment Compensation Board of Review*, 578 A. 2d 606 (Pa. Commw.Ct. 1990). In a Wisconsin case with close factual similarity, the court found that the violation of a no-strike clause of a bargaining agreement constituted a wilful interference with the employer's interest and rose to a level of misconduct. *Universal Foundry Company v. Department of Industry, Labor, and Human Relations*, 273 N.W. 2d 324 (Wis.1979). *See also G.A. Aalbers v. Iowa Dept. of Job Service*, 431 N.W.2d 330 (1988).

¶12. This Court is satisfied that an employee's wilful refusal to report for work for the purpose of participating in an unauthorized strike when the employee had actual knowledge that participation in the strike violated the provisions of the agreement under which he was employed rises to the level of

disqualifying misconduct and may not be dismissed as a mere isolated incident of insubordination. To the extent, therefore, that the circuit court relied on authority that such isolated incidents may not constitute disqualifying misconduct, we agree with the Commission that the circuit court applied an incorrect legal standard.

¶13. Finding that there was substantial evidence to support the factual findings of Commission and further finding that wilful participation in an unauthorized strike at a time when an employee is required to be at work constitutes disqualifying misconduct, this Court concludes that there is no basis to disturb the determination of the Commission. The circuit court, in doing otherwise, exceeded the scope of its authority sitting as an appellate court considering the action of an administrative body.

¶14. **THE JUDGMENT OF THE CIRCUIT COURT OF SHARKEY COUNTY REVERSING THE DECISION OF THE BOARD OF REVIEW OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION IS REVERSED AND REMANDED AND THE DECISION OF THE BOARD OF REVIEW OF THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION IS REINSTATED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

SOUTHWICK, P.J., BRIDGES, MYERS, AND THOMAS, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PAYNE AND LEE, JJ. CHANDLER AND IRVING, JJ., NOT PARTICIPATING.

KING, P.J., DISSENTING:

¶15. I respectfully dissent from the majority opinion herein. The majority reverses the decision of the Sharkey County Circuit Court, and by so doing denies unemployment compensation benefits to Bobbie F. Berry and Rose M. Berry.

¶16. Rose M. Berry and Bobbie F. Berry were included in a number of persons fired by Freshwater Farms on November 16, 1998. Freshwater Farms gave as the reason for firing Bobbie F. Berry and Rose M. Berry their participation in a strike in violation of the Union Contract. Freshwater Farms alleged that the Union Contract required that any complaint (grievance) be handled under the grievance procedure, set forth in Article V of the Union Contract. Article V, Section 1 of the Union Contract defines a grievance "as a dispute with respect to the alleged violation by the company of a specific provision of this Agreement, with the procedure for settlement of such grievance being set forth in paragraph 2 of this Agreement."

¶17. In May of 1998, Freshwater workers met with Dean Kikes the General Manager of Freshwater Farms, to resolve some fourteen grievances. These included (1) not being permitted to go to the bathroom when necessary, (2) precluding advancement to management or other better jobs, by not giving notice of existing vacancies, (3) limited telephone access, (4) lack of courtesy when speaking with employees, (5) more witnesses should be required when an employee is written up, (6) denial of unemployment benefits, (7) charging fees to employees to retrieve employee information, (8) lack of security in the parking lot, (9) the supply exchange policy, (10) the failure of group leaders to spend adequate time in the plant, (11) the need to place new employees with a senior employee, (12) the need for proper cutting tools, (13) proper pay for making production, and (14) the need for regular meetings with union stewards.

¶18. In November 1998, the Freshwater Farms workers identified five grievances. The first grievance was

set out in a November 11 letter, regarding the OSHA report, and complained of the existence of maggots and dead flies in the processing area and the toxic smell in the plant.

¶19. The second and third grievance, lack of time to go to the bathroom and improper cutting tools, were also included in the May 1998 list of grievances.

¶20. Grievances four and five were allegations of racial discrimination and sexual harassment. The claimants testified that sexual harassment was quite common, and that it was openly done in the presence of supervisors, who took no action and stated that the General Manager was aware of the existence of sexual harassment in the plant. The employer's representative did not specifically dispute this, but rather stated he personally was unaware of any harassment until receiving documentation after claimants' firing.

¶21. The employer's representative did not refute the claims of racial discrimination, but testified to having no personal knowledge of these claims.

¶22. The testimony of the employer's representative indicates that the firing of claimants was not related to the merit, or lack of merit, in their grievances, but rather the fact that claimants did not follow the grievance procedure of Article V of the Union Contract.

¶23. The employer intended that its obligations and responsibilities, including use of the grievance procedure, would be limited to the specific requirements of the Union Contract. That intent is set forth in Article III, Section 1 of the Contract, which states:

> The function of this Agreement is to record exactly and exclusively the Employer's collectively-bargained obligations. It creates no implied obligations: Its failure to grant expressly any right or privileges to Union or employees constitutes complete reservation of managerial discretion on that issue. The rights and privileges which are granted specifically cannot be enlarged or supplemented by references to unwritten or extrinsic sources such as oral understandings, policies or practices. Any ambiguity shall be resolved in favor of retained managerial discretion except to the extent that the Agreement expressly restricts its exercise.

¶24. Those matters outside of the Union Contract are not subject to its dictates. A review of that contract shows that some of the matters complained of clearly fall outside the scope of the Union Contract.

¶25. Indeed, the employer's representative testified that claims of racial discrimination and sexual harassment are not covered by the Union Contract. If they are not included in the Union Contract, then the definition of grievance, as set forth in Article V, Section 1 of the Union Contact, would exclude them, and of necessity exclude them from the grievance process.

¶26. If racial discrimination and sexual harassment are not covered by the grievance process, the failure to file a grievance cannot be considered as misconduct, which would preclude the payment of unemployment benefits. Under these circumstances, to require that Claimants file grievances on their claims of racial discrimination and sexual harassment would be to require a foolish and futile gesture. There is no justification for such a requirement.

¶27. Our supreme court has defined misconduct as"conduct evoking such willful and wanton disregard of the employer's interest as found in deliberate violation of standards of behavior which the employer has the right to expect of his employee". *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). The failure to

engage in a foolish and futile gesture, which is inapplicable to the complaint cannot be considered misconduct sufficient to deny unemployment compensation benefits.

¶28. Likewise the refusal to subject one's self to continued sexual harassment cannot as a matter of law, be considered as misconduct for the purpose of denying unemployment compensation. *Hoerner Boxes, Inc. v. Mississippi Employment Security Commission*, 693 So. 2d 1343, 1348 (Miss. 1997).

¶29. Just as some of the complaints of the Berrys were clearly beyond the scope of the contract, others were equally as clearly within the scope of the contract. Those complaints within the scope of the contract were subject to the grievance process. The failure to follow that process may well serve as the basis for the discharge of an employee. Employee conduct which justifies dismissal does not of necessity mandate a denial of benefits. That conduct which would justify the denial of unemployment compensation benefits must be recurring and willful or in wanton disregard of the employer's rights. *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). The strike of November 1998 was neither recurring nor in wanton disregard of the employer's rights.

¶30. A review of the record indicates that at least two of the November complaints were recurring matters, which, without good result, had previously been subjected to the grievance process. Where the same complaint continues unabated after the grievance process, I am not prepared to say that the failure to again submit that complaint to the grievance process is misconduct which mandates the denial of unemployment compensation benefits. Nor can the refusal to work in unsanitary conditions, specifically the significant presence of maggots and dead flies with the attendant health hazard, be considered as misconduct which would justify a denial of unemployment compensation benefits. *Mississippi Employment Security Commission v. Noel*, 712 So. 2d 728 (¶ 9) (Miss. Ct. App. 1998). The same is true of the refusal to continue to work with improper cutting tools, where to do so would subject the worker to increased exposure to carpal tunnel syndrome.

¶31. Actions taken by an employee to protect himself from an actual threat of injury to his mental or physical health are not misconduct as to justify the denial of unemployment compensation benefits. *Mississippi Employment Security Commission v. Noel*, 712 So. 2d 728 (¶ 9) (Miss. 1998).

¶32. Clearly the Union Contract provided a basis upon which to discharge claimants. That basis was the strike in violation of the Union Contract. However, the burden of proving misconduct to support the denial of unemployment compensation, is an affirmative obligation and must be borne by the employer. Miss.Code.Ann. §71-5-513 A (1)(c) (1972), *Little v. Mississippi Employment Security Commission & Kentucky Fried Chicken of Amory*, 754 So. 2d 1258 (¶ 10) (Miss. Ct. App. 1999). Proof of that affirmative obligation requires more than merely establishing a reason to dismiss an employee. *Shannon Engineering & Construction, Inc. v. Mississippi Employment Security Commission and Reginald Berry*, 549 So. 2d 446, 450 (Miss. 1989). It requires that the established reasons for dismissal demonstrate a recurring willful or wanton disregard of the employer's right. *Mississippi Employment Security Commission v. Flanagan*, 585 So. 2d 783, 785 (Miss. 1991). As noted by the trial court, the claimants actions did not rise to the level of a recurring willful or wanton disregard of the employer's interest.

¶33. For the foregoing reasons, I would affirm the decision of the circuit court to award benefits.

LEE AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.