TAMMY PAYNE, Plaintiff/Appellant, v. MARGARET C. CULPEPPER, in her capacity as Commissioner of the Tennessee Department of Employment Security; and DENIM PROCESSING, INC., Defendants/Appellees.	)	Appeal No. 01-A-01-9606-CH-00278 Davidson Chancery No. 95-3333-II

FILED

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COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by Plaintiff Tammy Payne, from the judgment of the trial court affirming an order of the Department of Employment Security which found that Plaintiff was not entitled to unemployment compensation.

Plaintiff Tammy Payne was discharged from her job, and subsequently applied for unemployment benefits pursuant to Tennessee Code Annotated section 50-7-303 (1991). She was denied benefits because of work-related misconduct. The appeals tribunal, following an evidentiary hearing, affirmed the decision concluding that "[t]he facts do show that the claimant disregarded the employer's interests and willfully acted against the best interests of the employer. . . . Claimant was discharged for excessive tardiness and absenteeism. She was given warnings. Claimant continued to miss a lot of work and was late for no reason." Subsequently, these findings were adopted by the Board of Review of the Tennessee Department of Employment Security. From the decision of the Board of Review, the plaintiff appealed to the Chancery Court for Davidson County, which entered an order affirming the final decision and dismissing the plaintiff's petition for certiorari.

The evidence showed that Ms. Payne worked as a presser at Denim Processing, Inc. (DPI) from July of 1990 to April of 1995. Ms. Payne, who was a single parent of a five-year-old son, worked a shift from 6:00 a.m. to 2:30 p.m. In November of 1993, Ms. Payne was injured in an auto accident causing her to miss eleven days of work the following December for surgery and causing her to be on medical leave for all of January and February of 1994 in order to recover. She returned to work in March of 1994 but was absent two days in March, one day in April, and one day in May due to illness. In addition, she only worked partial hours on another day in May. There is no indication that Ms. Payne provided doctors' excuses for any of these absences other than the one in April. On May 18, DPI gave Ms. Payne her first warning which stated that she "ha[d] missed 4½ days in 3 months." In a specific place on the warning form, Ms. Payne marked that she "disagree[d] with Employer's description of violation." No disciplinary action was taken.

Ms. Payne was then absent one day in June for an appointment for her son for which she

provided a doctor's excuse. She was absent a day in July and a day in August both for which she produced excuses. She then spent two days in August working partial hours after which she received a second warning, on August 31, 1994, for missing "4 days since 5-18-94." This time, Ms. Payne marked that she "concurr[ed] with Employer's statement." Again, no disciplinary action was taken.

In September of 1994, Ms. Payne missed one day for family illness and another for an accident off the job both for which she provided doctors' excuses. In October, she worked partially on two days and completely missed another day due to an accident off the job. For one of the partial-hour days, she provided a doctor's excuse relating to her son's medical care. After being absent on November 1 for illness, on November 2, 1994, she was given her third warning for missing "4 days and 5½ hours since 8-31-94." As she had with her first warning, Ms. Payne noted her disagreement with DPI's description of the violation. And as with both prior warnings, no disciplinary action was taken.

Ms. Payne missed six more days in November for eye surgery related to the auto accident she had the year before. She provided an excuse for these absences in which the doctor suggested she miss all but the last two of these days. She missed one more excused day in November. In December, Ms. Payne missed one day for an accident off the job for which she did not provide an excuse. In January of 1995, she had one day of holiday, she was late for one day for her child's teacher meeting, and she missed one day due to her son being sick for which she had a doctor's note. In February, Ms. Payne missed one day for her son's illness and one to take him to the dentist. She provided an excuse for the latter. She missed a third day in February for bad road conditions.

On March 1, Ms. Payne was late and then had to leave early for contact lens problems. On March 3, she was late because of bad road conditions. On March 6, she was absent due to car trouble. On March 9, 16, and 25, she was late to work for no stated reason. On March 31, she had to leave early for her son's illness. She provided no doctors' excuses for the March absences. Ms. Payne had a doctor's appointment on April 12 for which she did provide an excuse. Her supervisor approved an April 18 absence for her to take her son to the doctor. When she returned to work on

April 19 with a doctor's excuse, she was fired. At the hearing before the appeals tribunal, Ms. Payne claimed that she was never taken to the office and told that she would be fired if she missed a certain amount of time. Also at the hearing, Mr. Triplett, the plant manager, claimed that the absences for medical appointments and bad roads did not count against Ms. Payne.

DPI had given its employees a new handbook in April of 1995. Ms. Payne testified at the hearing that she thought the new handbook meant that all prior absences were dismissed and that the number of absences that she was allowed to miss had started over as of the first of April. Mr. Triplett, testified that the handbook changed certain of the business's procedures such as how it handled write-ups and warnings, but not the number of permissible absences. The handbook was not made a part of the evidence.

On appeal, Ms. Payne argues that there is not substantial and material evidence that (1) DPI warned her that she would be fired if she did not improve her absenteeism and (2) that Ms. Payne willfully disregarded the employer's interest.

The standard of judicial review of a lower tribunal decision concerning the approval or denial of unemployment benefits is set forth in Tennessee Code Annotated section 50-7-304(i)(Supp. 1996). The code provides that, "[t]he chancellor may affirm . . . reverse, remand or modify the decision [of the board of review] if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . [u]nsupported by evidence which is both substantial and material in light of the entire record." ***Id.*** § 50-7-304(i)(2)(E). The statute further requires that "in determining the substantiality of the evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the board of review as to the weight of the evidence on questions of fact." ***Id.*** § 50-7-304(i)(3).

On appeal, this court must also determine whether there is substantial and material evidence to support the findings of fact made by the lower tribunal. ***Johnson v. Bible***, 707 S.W.2d 510, 512 (Tenn. App. 1985). Substantial and material evidence has been defined as '"such

relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the actions under consideration.'" ***Southern Ry. Co. v. State Bd. Of Equalization,*** 682 S.W.2d 196, 199 (Tenn. 1984)(quoting ***Pace v. Garbage Dist.***, 390 S.W.2d 461, 463 (Tenn. App. 1965)). If the record contains such evidence, review by this court is confined to whether the lower tribunal erred when it applied the law to the facts found, that is, review is confined to a de novo review as to questions of law. ***Perryman v. Bible***, 653 S.W.2d 424, 429 (Tenn. App. 1983); ***Irvin v. Binkley***, 577 S.W.2d 677, 678 (Tenn. App. 1978).

In Plaintiff's first argument, she claims that the employer failed to present substantial and material evidence that it warned the plaintiff she would be fired if she did not improve her absenteeism. However, we are unable to find any Tennessee statute or case law which creates in an employer an affirmative duty to warn an employee of eminent termination due to excessive incidents of absence or tardiness. While it is true that employer warnings are one of the elements a court considers when determining whether an employee's behavior equals misconduct, a "final" warning is not a prerequisite for a finding of misconduct. Rather, "[t]he degree of disregard for the employer's interest shown by absenteeism that will equate with misconduct, may involve many factors and the weight and significance to be assigned them defies precise delineation." ***Wallace v. Stewart***, 559 S.W.2d 647, 649 (Tenn. 1977). Factors which are considered by courts include the following: whether a policy as to absenteeism exists, how many incidents of tardiness or absenteeism exist relative to the length of time at issue, whether sufficient advance notice of absences are forgiven by the employer, and whether absenteeism continued to occur in the face of the employer's warnings. See, e.g. ***Miotke v. Kelley***, 713 S.W.2d 910, 913 (Tenn. App. 1986); ***Perryman***, 653 S.W.2d; ***Lee v. Traughber***, No. 64, 1989 WL 22755 (Tenn. App. 1989).

Repeated absenteeism and tardiness are implicit violations of the basic "right of the employer to expect employees [to] appear for work" when they have agreed to. ***Wallace***, 559 S.W.2d at 648. The contract of employment which exists between employee and employer is based on the employee's duty to appear for work. An employee's repeated breach of this duty would be minimized if this court should adopt the rule that an employer is responsible for warning employees that their failure to comply with contractual duties will result in termination. We therefore refuse

to find that the employer has such an affirmative duty.

Finally, while the employer did not issue a "last chance" warning, we think it is significant that the plaintiff received written warnings concerning absenteeism on three separate occasions. Moreover, the defendant's plant manager testified as follows:

> We felt we had worked with [the plaintiff] ever since she had been here. She had been an absentee problem and a portion of that [was] completely understandable in - in the years that she had been here; but it continued. Nothing seemed to improve any up until the year of 95 . . . we think this comes to the level of what we can do as far as absentees were concerned, absentees, being late, leaving early.

In light of the plaintiff's established pattern of conduct and of the warnings she received, we respectfully disagree with the plaintiff's contention that she was not aware that her tardiness and absences constituted behavior which breached her duties as an employee. Plaintiff knew or should have known her pattern of absenteeism and tardiness threatened her continued employment with her employer.

In view of our determination that the employer has no duty to issue a "last-chance" warning, we address the plaintiff's challenge to the Board of Review's finding that she "disregarded the employer's interests and willfully acted against" this interest. The statute provides that "[a] claimant shall be disqualified for benefits . . . [i]f the commissioner finds that a claimant has been discharged from such claimants' most recent work for misconduct connected with such claimants' work." Tenn. Code Ann. § 50-7-303(a)(2). In ***Armstrong v. Neel, 725 S.W.2d 953*** (Tenn. App. 1986), this court defined misconduct related to work as "conduct evidencing such willful and wanton disregard of an employee's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or the employee's duties and obligations to the employer. ***Id.*** at 956 (quoting ***Boynton Cab Co. v. Neubeck***, 296 N.W. 636, 640 (Wis. 1940)). As we have already stated, "[n]o aspect of contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon." ***Wallace***, 559 S.W.2d at 648. The supreme court in ***Wallace*** further said that, "[p]ersistent

failure to honor that obligation evinces a substantial disregard for the employer's interest and may justify a finding of misconduct connected with the employment." ***Id.***

We think the evidence clearly shows that the plaintiff willfully and wantonly disregarded her duties as an employee. Plaintiff's shift ended at 2:30 p.m. Her tardiness and absences which were occasioned by appointments at her son's school or by repair work done on her vehicle could have been scheduled during normal business hours after plaintiff's shift was completed. In addition, a number of plaintiff's absences due to family illness could have been avoided if she had scheduled her son's medical appointments after 2:30 p.m. This failure to schedule personal matters at a time which does not conflict with the obligation to appear for work constitutes intentional disregard for the interest of the employer.

Plaintiff's disregard for her duty as an employee is further illustrated by certain incidents of tardiness which occurred in March of 1995 prior to her termination. Within a three week period, Plaintiff was late to work without excuse on three occasions and on one of these, she was late three hours and forty-five minutes. Such recurring, unexplained tardiness indicates a disregard for her employer's interest.

We think that ***Wallace v. Stewart,*** 559 S.W.2d 647 (Tenn. 1977), is on point with the instant case. In ***Wallace***, during a thirty-two month employment period the plaintiff was absent forty-five days and tardy fifty days for a total of ninety-five days or some four days per month of employment. Thirty-two of the absences were due to illness of herself or of one of her children, as were ten of the tardiness incidents. ***Id.*** At 647. "For reasons other than illness, claimant was absent [thirteen] days and reported late for work on [forty] additional days, the excuses being traffic, no ride, car trouble, flat tire, no babysitter, business, and the like." ***Id.*** At 648. In ***Wallace***, the employee was given four warnings before termination. The supreme court held that the record was sufficient to support a finding of misconduct based on warnings given and all the circumstances of the case. ***Id.*** at 649. In the instant case, plaintiff was absent or tardy a total of thirty-eight days over a twelve month period which was more than three days per month. (This excludes forty-nine days of leave of absence for recovery due to a non-work-related car accident.) The trial court found that

plaintiff was absent in 1994 "for two months on a leave of absence, eleven days for personal illness, five days due to accidents off the job, one day due to family illness, and five partial days for various reasons." In the four months the petitioner worked in 1995, she was "absent three days for family illness, once for personal reasons, once due to transportation problems, and once due to bad weather. She worked only partial days on three occasions. She was also tardy for five days of work."

As in ***Wallace***, Plaintiff here received prior written notice of the employer's policies concerning absenteeism and tardiness and was subjected to three written disciplinary warnings. We are of the opinion that the instant case is controlled by ***Wallace v. Stewart*** and, therefore, the department and the trial court correctly determined that the plaintiff is not entitled to receive unemployment compensation benefits due to her misconduct related to work. The judgment of the chancery court is affirmed with costs assessed to the plaintiff/appellant. The cause is remanded to the trial court for any further necessary proceedings.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE