

IN THE COURT APPEALS OF THE STATE OF MISSISSIPPI

No. 2014-CC-00555

FRANKLIN COLLECTION SERVICE

APPELLANT

VS.

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY and
ANGELICA WESTBROOK**

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

I. There was sufficient evidence that Ms. Westbrook made the false statement intentionally rather than by accident and no substantial evidence that her act was accidental or inadvertent.

MDES acknowledges that deliberate or willful violation of policies or rules of conduct is misconduct and that a single incident untruthfulness or falsification will disqualify an employee from unemployment benefits. (Brief of Appellee, p. 6.) Thus, MDES appears to concede that Ms. Westbrook was guilty of misconduct if she knowingly and deliberately misrepresented the processing fee as being an interest charge. MDES argues, however, that Franklin did not present sufficient evidence that Ms. Westbrook made the false statement about interest deliberately rather than accidentally. In its initial brief, Franklin argued the reverse--that a finding, if any, that Ms. Westbrook made the false statement by accident rather than deliberately was not supported by substantial evidence but rather was contrary to the great weight of the evidence. (Brief of Appellant pp. 15-20.)

Contrary to MDES's contention, the evidence at the hearing was sufficient to prove that Ms. Westbrook's act was willful and deliberate. Franklin presented uncontroverted circumstantial evidence from which it may be inferred that the false statement was deliberate rather than accidental. As MDES acknowledges, Ms. Westbrook was aware of company policy, had been trained on what not to say to debtors, and knew that the fee was for processing electronic payments and was not an interest charge. (Brief of Appellee, p. 10.) Ms. Westbrook was an experienced collector (R. 120), so it is quite unlikely that she would have been confused about the nature of the fee during the telephone call in question. And since, as the ALJ acknowledged, Franklin does not charge or collect interest on debts it collects (R. 124, 135), the word

“interest” would not be in Ms. Westbrook’s usual vocabulary for her conversations with debtors, so the possibility of her subconsciously substituting one frequently-used term for another does not come into play. Also, because the concept of incurring a processing fee for an electronic payment is dissimilar to the concept of paying interest on a debt, the possibility that Ms. Thomas accidentally used the wrong word as a result of getting similar concepts confused is very remote. Since the foregoing evidence shows that it is unlikely that the false statement was mistaken or inadvertent, the evidence thus tends to prove that the false statement was deliberate.

Absent an admission, the only way to prove a person’s state of mind is with circumstantial evidence. MDES’s argument that Franklin’s evidence is insufficient to prove that she deliberately made the false statement advocates a standard for proving an employee’s intent under which an employer could never prove misconduct without a confession from the employee.

MDES relies on *Brandon v. MESC*, 768 So. 2d 341 (Miss. 2000), in which the court disagreed with the employer that the claimant had committed misconduct by violating the employer’s rule against “solicitation.” However, the basis for the decision in *Brandon* was that the employee’s action was not misconduct because that action—assisting a patient to mark an absentee ballot—did not meet the definition of “solicitation.” *Id.* at 348. *Brandon* is thus inapposite, because in this case it is clear that knowingly describing a processing fee as interest violates Franklin’s policy (not to mention the FDCPA’s rule) prohibiting false statements by collectors.

MDES also relies on *Woodland Village Nursing Center v. MDES*, 138 So. 3d 946 (Miss. Ct. App. 2013), for its purported holding that an employer had failed to prove misconduct because it had failed to prove that the employee knew that her conduct

could result in immediate discharge. MDES suggests that, based on *Woodland Village*, Franklin failed to prove misconduct because it did not prove that Ms. Westbrook knew that lying to a debtor could result in termination rather than a warning under a progressive discipline scheme. MDES's reliance on *Woodland Village* is misplaced for several reasons. First, in *Woodland Village* the Board of Review had made a finding of fact regarding the alleged non-existence of, and the employee's lack of awareness of, the disciplinary policy upon which her discharge had been based (which was that five write-ups within a year would result in termination), and the court held that such finding was supported by substantial evidence. (*Id.* at 949 (¶ 3), 951 (¶ 15), 952 (¶ 19).) Here, the ALJ made no finding of fact regarding Ms. Westbrook's knowledge of the consequences of her action. This court is not permitted to make findings of fact, which it would have to do in order to hold that Ms. Westbrook had no knowledge that her act was a firing offense. Second, what the Board of Review in *Woodland Village* had actually held was that the employee was unaware of the disciplinary policy used to terminate her and that it had not even been proven that the policy was in effect at the time of her discharge; in other words, the employee was not aware that her act violated any policy of the employer. (*Id.* at 951 (¶¶ 15, 17).) Here, Ms. Westbrook admitted that she was aware of the prohibition on making false statements to debtors. (R. 128-29.) Third, *Woodland Village* is inapposite because it deals with termination for an accumulation of rules infractions, none of which may be serious in itself. However, as MDES's brief acknowledges, serious offenses including "untruthfulness" are misconduct even as single isolated offenses. (Brief of Appellee, p. 6.) Also, an employee committing a serious offense such as lying to a debtor in violation of federal law would be on notice simply from the nature of the offense, as the employee in *Woodland Village* was not,

that the consequences of the offense would be severe and could include termination. Fourth, MDES is simply wrong about the evidence of record regarding the consequences of making false statements. Although Franklin did not introduce in evidence its progressive disciplinary policy, Brittany Thomas testified without contradiction, and the ALJ expressly found, that under Franklin's policy the consequence of making false representations in violation of FDCPA was termination of employment. (R. 120-21, 135.) Also, unlike the claimant in *Woodland Village*, Ms. Westbrook did not testify that she was unaware that lying to debtors and violating the FDCPA in the course of attempting to collect the debt was a contrary to policy and could result in termination.

MDES also points to the fact that Franklin did not introduce the actual recording of the conversation or a transcript of that recording at the hearing. However, the probative value of the recording would have been as to whether or not Ms. Westbrook made the false statement regarding the nature of the fee, not as to her state of mind in doing so, and, as noted above, there was ample proof of the statement apart from the recording. That proof apparently was convincing to the ALJ, since she did not find that Ms. Westbrook did not make the statement or that Franklin's evidence on that point was lacking.¹ MDES does not explain how the recording would have been probative of Ms. Westbrook's intent regarding the false statement. As noted above, there was abundant circumstantial evidence that discounts the possibility that the false statement was inadvertent, and that evidence was uncontroverted. Consequently, the absence of the recording as evidence at the hearing is immaterial.

¹ MDES apparently does not dispute that the ALJ concluded that Ms. Westbrook made the false statement, since MDES argues in its brief that that ALJ's decision turned on the question of whether Ms. Westbrook's act was willful and deliberate. (Brief of Appellee, p. 13-14.)

MDES's assertion that Franklin "did not thoroughly investigate the matter" before firing Ms. Westbrook is not only beside the point (since the validity of the termination is not at issue), it is not supported by the record. After Franklin's call-monitoring department informed Brittany Thomas that Ms. Westbrook had described the convenience fee as interest, Ms. Thomas listened to the call and confirmed that fact. Another management employee, Taurse Harden, listened to the call along with Ms. Thomas. (R. 123.) It is extremely unlikely that all of those persons who listened to the recording could have been mistaken in their perception that Ms. Westbrook had made the false statement. Ms. Thomas interviewed Ms. Westbrook about the statement and allowed her to give her side of the story. (R. 124-25.) Other than denying or professing no recollection of having made the statement (which was worthless from Franklin's perspective, since the recording conclusively established that she did make the statement), Ms. Thomas gave (and still has given) no innocent explanation for the statement. In light of the above-referenced facts about Ms. Westbrook's training, knowledge, and experience, it was reasonable for Franklin's management to conclude that Ms. Westbrook made the false statement deliberately. Since the conversation was recorded, there was no reason to interview other employees about the incident. And since a single incident of misrepresentation to a debtor warranted termination, there was no reason go back and review any of Ms. Westbrook's other conversations with debtors.

In sum, Franklin produced direct evidence that Ms. Westbrook made the false statement and circumstantial evidence from which it may be inferred that she must have done so deliberately. Ms. Westbrook did not claim that she was confused about the nature of the fee or that she said "interest" when she meant "convenience fee" or explain

how she could have made a mistake like that; rather, she staked her position on her assertion that she simply did not make the statement at all or did not remember making it. (R. 129.) Thus, MDES's argument that the evidence shows only an "error in judgment" or an "inadvertent mistake" is without merit. To the contrary, the evidence that is lacking is that which would support a finding that the false statement was made without knowledge of its falsity—that is, that Ms. Westbrook thought that the fee in question really was for interest—or that Ms. Westbrook's said "interest" when she meant to say "convenience fee." Accordingly, MDES's brief does not refute Franklin's position that there was no substantial evidence to support a finding that Ms. Westbrook did not act deliberately when she made the false statement to the debtor.

For the foregoing reasons, there was sufficient evidence to prove that Ms. Westbrook deliberately made the false statement misrepresenting the nature of the convenience fee and a lack of substantial evidence to the contrary. Accordingly, if the ALJ indeed found that Ms. Westbrook made the misrepresentation accidentally, then that finding is arbitrary and capricious.

II. The conclusion of the Board of Review that making the false statement in question was not "misconduct" was an error of law.

In its initial brief, Franklin argued that the ALJ's decision should be interpreted as turning on a conclusion of law that even if Ms. Westbrook deliberately made the false statement about the nature of the convenience fee that would not constitute misconduct. Franklin further argued that the legal conclusion was erroneous. MDES's brief takes issue only with the first of those arguments, asserting that the decision of the ALJ was based on a finding of fact that Ms. Westbrook's act was not deliberate and willful. It appears that MDES's brief does not contest Franklin's argument that a conclusion by the

ALJ that even if Ms. Westbrook deliberately made the false statement that action would not rise to the level of misconduct would be contrary to law.

Even if MDES were correct that the ALJ did not base her decision on a legal conclusion that deliberately making the false statement was not misconduct under the circumstances, the decision could nonetheless be based on an erroneous conclusion of law. MDES position rests on the statement in the ALJ's decision that "[t]he evidence on record does not establish that the claimant willfully or deliberately disregarded the employer's interest." (R. 136.) Because the ALJ did not simply state a finding that the claimant did not act willfully but instead stated that *the evidence of record does not establish* that Ms. Westbrook acted willfully, the statement may well express a conclusion that the evidence offered by Franklin was insufficient as a matter of law to establish the element of deliberateness—in other words, that Franklin had not offered evidence from which it reasonably could be inferred that the false statement was deliberate and willful. That would be a conclusion of law, not a finding of fact. *See Vaughan v. State*, 759 So. 2d 1092, 1099 (Miss. 1999) (sufficiency of evidence is question of law); *Hall v. Hilbun*, 466 So. 2d 856, 878 (Miss. 1985) (same). And that legal conclusion would be erroneous. As discussed in part I above, Franklin presented ample evidence about Ms. Westbrook's knowledge and experience that would make it highly improbable that her false statement was inadvertent and that consequently would support the inference that she acted deliberately. Since the decision of the ALJ and the Board of Review may have been based on an erroneous conclusion of law, the court should reverse that decision.

III. The decision of the Board of Review is arbitrary and capricious in that the Board gave an insufficient explanation for the decision.

MDES asserts that the ALJ and the Board of Review gave an adequate explanation for its decision. But MDES's brief does not identify any reasons the ALJ gave for the result reached, because the ALJ's decision is silent as to what those reasons may have been—whether the ALJ disbelieved Franklin's witness and concluded that there was no false statement, whether the ALJ could not credit either witness's testimony over the other's and thus found the evidence in equipoise resulting in a failure of the employer to carry its burden of proof, whether the ALJ took Ms. Westbrook's claim of lack of memory of making the statement as proving that she made the statement accidentally, or whether the ALJ made no conclusions at all about the ultimate facts but instead ruled in favor of the claimant based on the legal conclusion that even if the claimant deliberately made the false statement such act did not rise to the level of misconduct. MDES's brief does not illuminate the reason because the ALJ's decision leaves the reasoning entirely in the dark. For that reason, the decision is arbitrary according to the relevant case law.

MDES attempts to distinguish *Public Employees Retirement System v. Marquez*, 774 So. 2d 421 (Miss. 2000), on the grounds that the case involved medical issues and the agency's decision had "no discussion or statement as to conflicting proof" whereas the ALJ's decision here "sets out the conflicting testimony." However, simply setting out the conflicting testimony does not advance an understanding of the reason for the decision without some express finding choosing between the conflicting accounts and explaining the rationale for doing so. The nature of the issue, whether a medical issue or simply an issue of what events occurred, is immaterial; the question is whether the agency gives a cogent explanation for the decision. *Marquez* is apposite because the

agency here, as in that case, simply stated its ultimate decision without any explanation of how that decision was reached. If simply reciting each party's evidence and the concluding that the employer failed meet its burden of proof were a sufficiently explicated decision, then the agency's decision in *Marquez* that "there is insufficient evidence to support Ms. Marquez's claim" would have been sufficient. *Marquez* and similar cases establish that the courts will not countenance a "black box" method of agency adjudication, where we see the presented evidence that goes in one side and the decision that emerges from the other side but not the mechanism by which the former leads to the latter. Yet that is the method followed by the ALJ and the Board of Review in this case.

MDES says that the ALJ did make a definitive resolution of the conflicting evidence in that she stated that Franklin failed to prove that Ms. Westbrook willfully gave false or misleading information. But what the ALJ actually said was that "[t]he evidence on record does not establish that the claimant willfully or deliberately *disregarded the employer's interest.*" Disregard of the employer's interest is part of the *legal definition* of "misconduct," so, as Franklin pointed out in its principal brief, that statement could have been a legal conclusion rather than a finding of fact that deliberately making a false statement to a debtor was not sufficiently contrary to the employer's interest to constitute misconduct. It could also have been a legal conclusion—an erroneous one, as explained in part II above—that the evidence offered by Franklin was insufficient as a matter of law to establish the element of deliberateness--in other words, that Franklin had not offered evidence from which it reasonably could be inferred that the false statement was deliberate and willful.

Moreover, the whole point is that to find as a fact that Ms. Westbrook did not

intentionally make the false statement the ALJ would have to weigh and evaluate the evidence, and there must have been something about the respective versions given by the parties that persuaded the ALJ to favor one over the other. Yet there is absolutely no explanation of what that something was. Rather, as in *Marquez*, “we do not know what it was about the evidence” that led the ALJ and the Board of Review to decide, if they did, that Ms. Westbrook made the false statement through ignorance or inadvertence rather than deliberately. *See Marquez*, 774 So. 2d at 429 (¶ 31). It was incumbent on the agency to explain how it chose between any conflicting evidence and why it rejected the evidence tending to show, as explained above, that it was very improbable that the description of the convenience fee as interest was accidental. *See Fortune Furniture Mfg. Co. v. Sullivan*, 279 So. 2d 644, 647 (Miss. 1973) (failure to furnish explanation for disregarding uncontradicted testimony made decision arbitrary). Therefore, the decision was arbitrary and capricious.

MDES also argues that the explanation was sufficient because the circuit court “had no problem discerning the ALJ’s reasoning and conclusion.” (Brief of Appellee, p. 13.) However, the circuit court stated its understanding only of the ALJ’s conclusion—that “[t]he evidence on record does not establish that the claimant willfully or deliberately disregarded the employer’s interest”—and made no observations about the reasoning that led to that conclusion. That the circuit court did not comment on the ALJ’s reasoning strongly indicates that such reasoning was not apparent or discernible from the decision. Furthermore, while the circuit court described the ALJ’s conclusion as that “the employer failed to prove that the Claimant’s actions were willful or deliberate” (R. 66; R.E. 5), the ALJ’s actual conclusion was that the evidence did not establish “that the claimant willfully or deliberately *disregarded the employer’s*

interest.” (R. 136.) As noted above and in Franklin’s initial brief, that statement may well have been a conclusion of law about the legal implications of a deliberate false statement or about the sufficiency of the evidence rather than a finding of fact about the claimant’s state of mind.

CONCLUSION

For the reasons set forth above and in Franklin’s principal brief, the decision of the Board of Review was arbitrary and capricious or contrary to law. Accordingly, this court should reverse the order and judgment of the court below and the decision of the Board of Review in all respects and render judgment for Franklin.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served via the court's electronic filing and notification system or by United States Mail, postage paid, a true and correct copy of the above and foregoing Reply Brief on:

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This, the 24th day of April, 2015.

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