

764 P.2d 1316  
Supreme Court of New Mexico.

Billie J. RODMAN, Petitioner–Appellant,  
v.  
NEW MEXICO EMPLOYMENT SECURITY DEPARTMENT and Presbyterian Hospital, Respondents–  
Appellees.

No. 17721.Nov. 30, 1988.

The District Court, Bernalillo County, Ross C. Sanchez, D.J., upheld administrative decision denying unemployment compensation to claimant. Claimant appealed. The Supreme Court, Ransom, J., held that incident precipitating claimant's termination demonstrated willful disregard for her employer's interests.

Affirmed.

Stowers, J., specially concurred and filed opinion.

**Attorneys and Law Firms**

**\*\*1317 \*759** Juan A. Gonzalez, Legal Aid Society of Albuquerque, Inc., Albuquerque, for petitioner-appellant.  
Connie Reischman, New Mexico Employment Sec. Dept., Albuquerque, for respondents-appellees.

**OPINION**

RANSOM, Justice.

An administrative decision of the New Mexico Employment Security Department denying unemployment compensation to Billie J. Rodman was reviewed on certiorari by the district court. Rodman now appeals to this Court from the order of the district court affirming the administrative decision.

Rodman had been employed by Presbyterian Hospital as a unit secretary for nearly eight years when, on February 17, 1987, she was terminated under hospital personnel policies following a "third corrective action" notice. Prior restrictions had been placed on Rodman's conduct due to personal problems adversely impacting upon her place of work. At issue is whether the misconduct which warranted termination from employment rose to the level of misconduct which would warrant denial of unemployment compensation under NMSA 1978, Section 51-1-7 of the Unemployment Compensation Law.

The Department reasonably summarizes the substantial evidence as follows: Rodman was reprimanded in June of 1986 for receiving an inordinate number of personal telephone calls and visitors at her work station, which was disruptive to her own work and to her co-workers. The formal reprimand set forth conditions to prevent further corrective action. Rodman was to have no personal telephone calls during work hours outside of a designated break or dinner time, in which event they were to occur in an area not visible to patients, physicians, or other department staff. When leaving the department for dinner, Rodman was to report to her immediate supervisor and was not to leave the hospital. Rodman was to make every effort to resolve the matters in her personal life that were causing problems at work.

Nevertheless, according to the testimony of her supervisor, extremely disruptive telephone calls continued. The doctors were beginning to comment on it. The staff was getting more distressed. According to her supervisor, "[A]gain we talked about the visits, the behavior at the desk. When it got pretty bad with the phone calls, Billie would slam charts, push chairs and be a little abrupt with the people she worked with." Another written reprimand in November of 1986 warned Rodman that her job was in jeopardy if the disruptive behavior continued. The supervisor established restrictions prohibiting the claimant from having visitors at the department and instructed her to notify security if there was a potential problem.

On February 15, 1987, Rodman began work at 1:00 o'clock in the afternoon. She had spoken to her boyfriend's mother earlier in the day to tell her that she did not want him to use her car as she had broken off their relationship. The boyfriend's mother called her at work and told her the boyfriend had her car keys. Rodman told the mother to have the boyfriend call her at work. When he did, she informed him that she could not talk to him at her duty station, and he hung up on her. He called her back and left a number where he could be reached. She left the work area and went to the break room to call him.

After returning to her duty station, Rodman got another telephone call from her boyfriend who told her to go downstairs to the lobby to meet him and pick up the keys. When she refused, he told her that if she did not come down he would come up to her department.

Claimant left the department to confront her boyfriend, and, because her supervisor was at lunch in the hospital cafeteria, Rodman notified a co-worker, a registered nurse, that she was leaving. Rodman testified, "I didn't want any kind of confrontation at the desk, so I went downstairs." Before she left her desk, Rodman called the employer's security guard and asked him to meet her in the lobby because she anticipated that a problem could develop.

When Rodman got to the lobby, her boyfriend started yelling and forced her outside. In doing so, he tore her shirt. At this point the security guard arrived and observed them arguing. Rodman was in the passenger seat of her car. The security guard instructed the boyfriend to return the keys, but the boyfriend jumped into the driver's seat, locked the doors and drove off.

About thirty-five minutes later, Rodman returned to her work station, after having changed her torn shirt. She resumed working, but, as the shift progressed, more telephone calls were received for her in the department. The supervisor became frustrated with the volume of calls and the behavior of Rodman. It was determined that Rodman should be sent home. Thereafter she was terminated.

The Appeals Tribunal of the Department of Employment Security found on the basis of the evidence that the appellant had proven unwilling to restrict her personal contacts while at work, as requested by her employer. The hearing officer dismissed as without **\*\*1319 \*761** merit Rodman's contention that she could not stop her acquaintances from calling or visiting her at work. The hearing officer concluded that Ms. Rodman's behavior was unreasonable, had caused many problems for her work section, and constituted misconduct connected with work under Section 51-1-7(B).

*The Meaning of "Misconduct" in New Mexico's Unemployment Compensation Law.*

Given the remedial purpose of the Unemployment Compensation Law, New Mexico courts, like most jurisdictions, interpret the provisions of the law liberally, to provide sustenance to those who are unemployed through no fault of their own, and who are willing to work if given the opportunity. *Wilson v. Employment Sec. Comm'n*, 74 N.M. 3, 14, 389 P.2d 855, 862-63 (1963); *Parsons v. Employment Security Comm'n*, 71 N.M. 405, 409, 379 P.2d 57, 60 (1963). Like most states, New Mexico also provides that an employee who is determined to have been discharged for "misconduct" is ineligible for unemployment compensation benefits. § 51-1-7(B). Two purposes are served by this statutory bar: first, it prevents the dissipation of funds for other workers; second, it denies benefits to those who bring about their own unemployment by conducting themselves with such callousness, and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits.

Given the remedial purpose of the statute, and the rule of statutory construction that its provisions are to be interpreted liberally, the statutory term "misconduct" should not be given too broad a definition. Accordingly, in adopting the majority definition of the term, this Court wrote in *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 577, 555 P.2d 696, 698 (1976):

"[M]isconduct" \* \* \* is limited to conduct evincing such wilful or wanton disregard of an employer's interests 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 \* \* \*. [M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Where an employee has not acted with the requisite degree of “fault” under *Mitchell*, he or she has not sacrificed a reasonable expectation in continued financial security such as may be afforded by accrued unemployment compensation benefits. It is therefore possible for an employee to have been properly discharged without having acted with such willful or wanton disregard for an employer’s interests as would justify denial of benefits. This Court recognized in *Alonzo v. New Mexico Employment Security Department*, 101 N.M. 770, 689 P.2d 286 (1984), that even an act of willful disobedience which leads to termination will not always rise to the level of “misconduct” when the act is an isolated incident in an otherwise favorable employment history and the incident does not cause a significant disruption of the employer’s legitimate interests. *Trujillo v. Employment Sec. Dep’t*, 105 N.M. 467, 472, 734 P.2d 245, 250 (Ct.App.1987) (where employment contract gave employer the right to draft employees to work overtime in emergency situations significantly affecting the employer’s interests, it was “misconduct” for appellees to have refused to report for overtime work).

*Alonzo* and *Trujillo* demonstrate that there are two components to the concept of misconduct sufficient to justify denial of benefits. One is the notion that the employee has acted with willful or wanton disregard for the employer’s interests; the other is that this act significantly infringed on legitimate employer expectations.

**\*\*1320 \*762** *Totality of circumstances and the “last straw” doctrine.*

Often, the courts have been confronted with a series of minor infractions by the employee, where each incident showed a willful disregard of the employer’s interests, but no single incident was serious enough to justify denial of benefits. In such cases, courts have applied a “totality of circumstances” or “last straw” test to determine whether, taken together, this series of incidents constitutes misconduct sufficient to disqualify the claimant from receiving benefits. *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 555 P.2d 696 (1976).

Rodman recognizes the “last straw” doctrine, but contends that the district court erred in applying the rule in this case because her infractions of February 15 were the result of acts of third parties over whom she had no physical or legal control. Appellant contends that she may not be denied unemployment benefits where the “last straw” which led to her termination was not willful or intentional, especially where, under the employer’s personnel policy, she could not have been discharged at all before this final incident.

The Department contends that it is immaterial whether the precipitating act was a willful or intentional violation of the employer’s rules, where the record indicates that the claimant had a history of previous acts which demonstrate a willful or wanton disregard for the employer’s interests, and the employer discharged the employee for the accumulation of events, including the precipitating event. *Fort Myers Pump & Supply v. Florida Dep’t of Labor*, 373 So.2d 429 (Fla.Dist.Ct.App.1979). Although *Fort Myers* does offer support for the appellee’s position, we believe termination for a series of incidents which, taken together, may constitute “misconduct” is distinguishable from termination for a single incident following one or more corrective action notices. In the latter event, as here, we hold that the “last straw” must demonstrate a willful or wanton disregard for the employer’s interests for unemployment benefits to be denied.

If substantial evidence existed that Rodman’s conduct on February 15, considered in light of the totality of circumstances including her previous history of personal phone calls and unauthorized visitors, showed a willful or wanton disregard for her employer’s interests, then Rodman’s benefits were properly denied.

Although the evidence in this case is amenable to more than one reasonable interpretation, we conclude that there was a substantial basis for the district court to decide that Rodman’s actions on February 15, when considered in light of the restrictions which had been placed upon her and her previous failure to comply with those restrictions, demonstrated a willful disregard for her employer’s interests.

Therefore, the decision of the district court is affirmed.

IT IS SO ORDERED.

WALTERS, J., concurs.

STOWERS, J., specially concurs.

769 P.2d 88  
Supreme Court of New Mexico.

In re Claim of Lucy APODACA.  
IT'S BURGER TIME, INC., Petitioner–Appellee,  
v.  
NEW MEXICO DEPARTMENT OF LABOR EMPLOYMENT SECURITY DEPARTMENT, BOARD OF  
REVIEW and Lucy Apodaca, Respondents–Appellants.

No. 17952.Feb. 22, 1989.

Employer filed writ of certiorari to challenge Employment Security Department's award of unemployment compensation to fast-food restaurant employee who refused to retint her purple hair. The District Court, Dona Ana County, Lalo Garza, D.J., reversed award of benefits. Employee appealed. The Supreme Court, Ransom, J., held that evidence supported Department's award of benefits.

Reversed and remanded.

**Attorneys and Law Firms**

**\*\*89 \*176** Jose R. Coronado, Southern New Mexico Legal Services, Inc., Las Cruces, Connie Reischman, New Mexico Dept. of Labor, Albuquerque, for respondents-appellants.  
Kelly P. Albers, Lloyd O. Bates, Jr., Las Cruces, for petitioner-appellee.

**OPINION**

RANSOM, Justice.

A determination by the Board of Review of the New Mexico Employment Security Department awarding unemployment compensation to Lucy Apodaca was reversed by the district court on certiorari. Apodaca appeals the district court decision, arguing that the court erred in finding the administrative determination was unsupported by substantial evidence and was contrary to law. We conclude substantial evidence supports the Board of Review decision that the conduct leading to Apodaca's termination did not constitute misconduct warranting denial of unemployment compensation under Section 51–1–7(B) of the Unemployment Compensation Law. Accordingly, we reverse the district court.

Apodaca was employed as a counter helper from August 1986 to August 1987 with It's Burger Time, Inc. Apodaca's supervisors had no complaints concerning the performance of her work. Several times during the summer of 1987, Apodaca approached the store manager, John Pena, to ask how the owner, Kevin McGrath, would react if she were to dye her hair purple. Pena did not at first take the question seriously. When Apodaca persisted, Pena told her that he would have to ask McGrath. Apparently, he never did so. After several weeks, Apodaca went ahead and dyed her hair. McGrath saw Apodaca's tinted hair for the first time at work two days later. He instructed Pena to give Apodaca a week to decide whether she wanted to retain her new hair color or her job. In a letter to the Board of Review, McGrath wrote that he had a good sense for community standards and believed he could not afford to wait until "this incident [took] it's [sic] toll on my business." Apodaca had signed the company handbook upon being hired, which instructed employees about acceptable hygiene and appearance. The handbook said nothing specific about hair color.

Pena relayed McGrath's message to Apodaca and suggested she make up her mind quickly so he could find someone to replace her if necessary. Two days later, Apodaca told Pena she had decided to keep her hair the way it was. She was then terminated and applied for unemployment benefits.

The Department initially determined that Apodaca was ineligible for compensation because she had been terminated "for refusing to conform to the standards of personal grooming compatible with the \* \* \* work [she was] performing." The claims officer concluded this constituted misconduct under Section 51–1–7(B). Apodaca appealed

to the Appeals Tribunal, which affirmed the denial of her benefits after a hearing. She appealed the Tribunal's decision \*\*90 \*177 to the Department's Board of Review. After reviewing the record of the hearing, the Board concluded that the employer failed to show how the color of Apodaca's hair affected its business; therefore, her refusal to return her hair to its original color did not rise to the level of "misconduct" required for denial of her benefits. For review of the Board's decision, the employer filed a writ of certiorari with the Dona Ana County District Court. The district court determined Burger Time's request to Apodaca to change the color of her hair was reasonable and enforceable and Apodaca's refusal of that request was misconduct. The court concluded that the Board of Review's decision was not supported by substantial evidence and was contrary to the law and reversed the decision granting Apodaca her benefits. This appeal followed.

In reviewing the district court decision, we look first to see whether the court erred in concluding that the Department's decision was unsupported by substantial evidence. Because we conclude that the court erred in this determination, it is unnecessary for us to examine the findings and conclusions adopted by the court.

#### *Misconduct and the employer's interest.*

Both Apodaca and Burger Time agree that the definition of "misconduct" as used in Section 51-1-7(B) is to be found in this Court's opinion in *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 577, 555 P.2d 696, 698 (1976):

"[M]isconduct" \* \* \* is limited to conduct evincing such wilful or wanton disregard of an employer's interests 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. \* \* \* [M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Apodaca does not deny that her refusal to redye her hair was an intentional and deliberate act. At issue in this case is whether an employee who refuses to alter her personal appearance in conformity with the employer's personal beliefs about acceptable community standards has engaged in misconduct. The employer argues, and the district court apparently agreed, that so long as the request is reasonable and the employee is given adequate time to comply, refusal amounts to "insubordination and misconduct." We disagree.

In *Alonzo v. New Mexico Employment Security Department*, 101 N.M. 770, 772, 689 P.2d 286, 288 (1984), we recognized that termination for an isolated incident which does not "significantly affect[ ] the employer's business" may not form the basis for denial of benefits on the grounds of misconduct. In *Alonzo*, an employee was terminated after refusing to wear a smock when working at the cash register as required by company policy. *Id.* at 771, 689 P.2d at 287. As here, the employee's previous work history was completely satisfactory, and there was no evidence that the employer's business interests had been affected. *Alonzo* should be compared with *Trujillo v. Employment Security Department*, 105 N.M. 467, 471-72, 734 P.2d 245, 249-50 (Ct.App.1987), which held that failure to report for overtime work pursuant to an employment contract provision allowing the employer to draft employees in emergency situations constituted misconduct, when the evidence demonstrated that the orders directing employees to report early to work were explicit and not confusing. In *Trujillo*, unlike *Alonzo*, failure to comply with the employer's request was recognized as having significantly affected the employer's interest. *See also Thornton v. Dep't of Human Resources Dev.*, 32 Cal.App.3d 180, 107 Cal.Rptr. 892 (1973) (refusal of restaurant employee to shave beard immediately or be terminated was not misconduct when employer failed to show that beard was unsanitary or otherwise detrimental to business); *cf. Lattanzio v. Unemployment Comp. Bd. of Rev.*, 461 Pa. 392, 336 A.2d 595 (1975) (claimant's refusal to report back to work was for good cause when employer demanded he shave beard but no evidence supported contention that requested alteration in appearance was essential to performance of duties other than employer's vague assertion that claimant's "modish" appearance might reflect unfavorably on business).

In this case, there is absolutely no evidence that the color of Apodaca's hair significantly affected Burger Time's business. McGrath and Pena both testified they received no customer complaints regarding the color of Apodaca's hair. Apodaca's immediate supervisor, testifying in her behalf, reported that the only comments she heard were

compliments and that Burger Time's customers had readily registered complaints in the past when they found something amiss. Under these circumstances, the Board of Review could properly decide that Apodaca's refusal to retint her hair did not rise to the level of misconduct.

Burger Time argues that none of our previous cases require an employer to demonstrate its business was affected by an employee's refusal to comply with a request from the employer. However, it is well established in New Mexico that the party seeking to establish the existence of a fact bears the burden of proof. *See Newcum v. Lawson*, 101 N.M. 448, 684 P.2d 534 (Ct.App.1984); *Carter v. Burn Constr. Co.*, 85 N.M. 27, 508 P.2d 1324 (Ct.App.), *cert. denied*, 85 N.M. 5, 508 P.2d 1302 (1973); *Wallace v. Wanek*, 81 N.M. 478, 468 P.2d 879 (Ct.App.1970); *cf. Moya v. Employment Sec. Comm'n*, 80 N.M. 39, 450 P.2d 925 (1969) (when claimant sought to establish that he ought not be disqualified from receiving benefits because the position for which he refused to interview was not suitable employment, he bore burden of proof on this issue).

In this case, pursuant to Department regulations requiring an employer to report why a claimant was fired or have that claimant's benefits charged against the employer's account, Burger Time submitted a letter stating that Apodaca refused to comply with company grooming standards. At each subsequent stage of the administrative process and before the district court, Burger Time sought to establish that Apodaca was terminated for misconduct. It therefore fell upon Burger Time to show that Apodaca's refusal to change the color of her hair amounted to misconduct under the standard considered in *Alonzo and Trujillo*. This, Burger Time failed to do and thus failed to meet its burden of proof. Moreover, Apodaca presented uncontroverted testimony that no customers complained, and some complimented her for her hair. We do not question Burger Time's right to establish a grooming code for its employees, to revise its rules in **\*\*92 \*179** response to unanticipated situations, and to make its hiring and firing decisions in conformity with this policy. However, as we noted in *Rodman*, "It is \* \* \* possible for an employee to have been properly discharged without having acted [in a manner] as would justify denial of benefits." 107 N.M. at 761, 764 P.2d at 1319.

**2** *Definition of misconduct and the right to terminate.* Although not directly presented on appeal in this case, we note that in their decision letters both the Appeals Tribunal and the Board of Review used the following definition: "The term 'misconduct' connotes a material breach of the contract of employment *or* conduct reflecting a willful disregard of the employer's best interests." (Emphasis added.) We rejected this definition in *Rodman*, 107 N.M. at 763, 764 P.2d at 1321, as inconsistent with the *Mitchell* standard requiring a willful or wanton disregard of the employer's interests. The use of the term "or" implies that any breach of the employment contract sufficient to warrant discharge of the employee serves as adequate grounds for denial of benefits, whether or not the employee acted in a willful or wanton manner. "Where an employee has not acted with the requisite degree of 'fault' under *Mitchell*, he or she has not sacrificed a reasonable expectation in continued financial security such as may be afforded by accrued unemployment compensation benefits." *Id.* at 761, 764 P.2d at 1319.

The decision of the trial court is reversed, and this case is remanded for entry of judgment consistent with the decision of the Board of Review.

IT IS SO ORDERED.