IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

AMY R. HOLLINGSWORTH **APPELLANT**

VS. **CAUSE NO. 2006-CC-01793**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY **APPELLEE**

brief

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, Appellee
2. Amy R. Hollingsworth, Appellant
3. Scott O. Nelson, Esquire, Attorney for Appellant
4. LeAnne F. Brady, Attorney for Appellee
5. Honorable Robert B. Krebs, Jackson County Circuit Court Judge
6. The Eyeglass Factory, Employer

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

CASES, continued PAGE

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

AMY R. HOLLINGSWORTH **APPELLANT**

VS. **CAUSE NO. 2006-CC-01793**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY **APPELLEE**

STATEMENT OF ISSUES

1. Whether the Administrative Appeals Officer, affirmed by the Board of Review, correctly decided that there is substantial evidence to prove that Amy R. Hollingsworth, refused a suitable offer of work under Mississippi Code Annotated Section 71-5-513 (A)(1)(b)(Supp. 2005).

2. Whether the Claimant is obligated to repay the overpayment of benefits received under Mississippi Code Annotated Section 71-5-19.

STATEMENT OF THE CASE

Amy R. Hollingsworth [also hereafter referred to as "Claimant"] was employed with the Eyeglass Factory [also hereafter referred to as "Employer"] in Pascagoula, Mississippi. (R. Vol. 2 p. 1). On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast. This caused many businesses to close for a period of time after the hurricane, including the Eyeglass Factory. On approximately September 6, 2005, the Eyeglass Factory opened for clean up and repair. (R. Vol. 2 p. 16). On or about September 16, 2005, Ms. Hollingsworth was contacted by the Eyeglass Factory and asked to return to work. (R. Vol. 2 p. 19-20). The Claimant said she could not come back

because she did not have suitable childcare. (R. Vol. 2 p. 19-20). The Employer offered to allow the Claimant to bring her children to work with her. Claimant still refused to return to work. (R. Vol. 2 p. 17, 19, 21).

Ms. Hollingsworth filed a claim for unemployment benefits. (R. Vol. 2 p. 1). Notice of the claim was sent to the Eyeglass Factory and MDES received information from the Employer that the claimant had not returned to work after the hurricane. (R. Vol. 2 p. 2). The Claims Examiner investigated the facts and circumstances surrounding this case, and found that the Claimant failed to accept a suitable offer of work and was disqualified from benefits. (R. Vol. 2 p. 4). Subsequently, the Claimant appealed the decision of the Claims Examiner and a hearing before the Administrative Appeals Officer [hereafter also referred to as "AAO"] was held April 14, 2006, at which the Claimant and an Employer Representative testified. (R. Vol. 2p. 10-35). Based upon the testimony presented at the hearing, the Administrative Appeals Officer found the Claimant was disqualified from receiving unemployment benefits for refusing an offer of suitable work under Mississippi Code Annotated Section 71-5-513(3) and the claimant was obligated to repay the overpayment established against her. (R. Vol. 2 p. 36-38). The AAO's Findings of Fact and Opinion are as follows:

> **FINDINGS OF FACT: (Suitable Work Issue)**
>
> The claimant was employed at the Eyeglass Factory in Pascagoula, Mississippi, for four years and two months in the capacity of an assistant. Her last day of work was August 28, 2005, when Hurricane Katrina struck the Mississippi Gulf Coast.
>
> The employer was closed from August 29, 2005, through September 5, 2005. On September 6, 2005, the employer reopened their office without electricity to service patients who had lost their glasses and contacts in the storm. The employer also had clean up work to do, as carpet and furniture was damaged in the storm.

The claimant made her first contact to the employer on September 12, 2005. The employer asked the claimant to return to work. The claimant refused because she had no baby sitter.

The employer offered to allow the claimant to bring her three children to work with her, but the claimant refused. The claimant had no one to watch the children. The schools did not open until October 3, 2005.

OPINION:

Section 71-5-513(3) of the Law provides that an individual shall be disqualified for benefits if the Department finds that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Department, to accept suitable work when offered him or to return to his customary self-employment (if any) when so directed by the commission; such disqualification shall continue for the week in which such failure occurred and for not more than twelve (12) weeks which immediately follow such week, as determined by the Department according to the circumstances in each case.

The evidence shows that the claimant refused an offer of suitable work without good cause.

The employer attempted to accommodate the reason for the claimant's refusal and the claimant continued to refuse the offer of suitable work.

The decision rendered by the Claims Examiner is in order.

DECISION:

Affirmed. The claimant is disqualified from September 12, 2005, through December 3, 2005, for refusing an offer of suitable work. This base period employer's experience rating record is entitled to a non-charge.

FINDINGS OF FACT: (Obligation to repay overpayment)

The claimant received benefits for weeks ending September 12, 2005, through December 3, 2005, at $210 per week. The overpayment resulted from a disqualification of benefits imposed from September 12, 2005, through December 3, 2005. The Administrative Appeals Officer sustained the disqualification.

OPINION:

> Section 71-5-19(4) of the Law states, any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact, irrespective of whether such nondisclosure or misrepresentation was known or fraudulent, or who, for any other reason has received any such benefits under this chapter, while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall be liable to repay to the department for the unemployment compensation fund a sum equal to the amount so received by him.

DECISION:

> Affirmed. The claimant is obligated to repay the assessed overpayment along with any interest that may accrue on the unpaid balance.

(R. Vol. 2 p. 36-38).

The Claimant appealed to the Board of Review which adopted the Findings of Fact and Opinion of the AAO. (R. Vol. 2 p. 48). Aggrieved, the Claimant appealed to the Circuit Court of Jackson County, which affirmed the decision of the Board of Review. (R. Vol. 1 p. 2, 32). The Claimant then perfected her appeal to this Honorable Court. (R. Vol. 1 p. 33).

SUMMMARY OF THE ARGUMENT

The applicable statute in this case, Mississippi Code Annotated Section 71-5-513 (A) provides for disqualifying persons from benefits otherwise eligible, if they have refused an offer of suitable work.

In the present case, Ms. Hollingsworth admitted that she was asked to come back to her employment at the Eyeglass Factory but refused to do so because she could not find adequate childcare. Ms. Hollingsworth also testified that her employer offered to allow her to bring her children to work with her, but she still refused to return because

she felt the environment was unsafe. Ms. Hollingsworth also asserts that her post-Katrina duties would be different than those pre-Katrina, therefore, making the work unsuitable.

From the Employer's testimony, most of the Ms. Hollingsworth concerns about the work environment were corrected by the time she was asked to return. It is also clear that the employer mainly needed her assistance with patients, which was part of her pre-Katrina duties.

Based on the record, it is the contention of MDES that the testimony and evidence, taken as a whole, before the Administrative Appeals Officer was sufficient and substantial and did show that the Claimant refused an offer of suitable work. Thus, the Claimant is disqualified from receiving benefits under the Mississippi Employment Security Act and is obligated to repay the assessed overpayment. This Honorable Court should affirm the decision of the Board of Review.

ARGUMENT

I. Standard of Review

Ms. Hollingsworth's appeal to the Circuit Court is governed by Mississippi Code Annotated Section 71-5-531 (Supp. 2005), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the appeals court shall consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. Richardson vs. Mississippi Employment Security Commission, 593 So. 2d 31 (Miss. 1992); Barnett vs. Mississippi Employment Security Commission, 583 So. 2d 193

(Miss.1991); Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982). Likewise, the Supreme Court should apply the same standard in further reviewing this matter.

In Barnett, the Mississippi Supreme Court held

> {J}udicial review, under Miss Code Ann. Section 71-5-531 (1972), is in most circumstances, limited to questions of law, to-wit:
>
> > In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said shall be confined to questions of law.

Barnett, 583 So. 2d at 195. Furthermore, a rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen vs. Mississippi Employment Security Commission, 639 So. 2d 904 (Miss. 1994). The appeals court also must not reweigh the facts nor insert its judgment for that of the agency. McLaurin vs. Mississippi Employment Security Commission, 435 So. 2d 1171-1172 (Miss. 1983).

II. There was substantial evidence to support the Board of Review's decision affirming the AAO finding that the Claimant has refused an offer of suitable work.

Mississippi Code Annotated Section 71-5-513A (3) provides that a claimant shall be disqualified from receiving benefits if they fail, without good cause, either to apply for available, suitable work, accept suitable work when offered, or to return to his customary self-employment. Although the statute does not define "good cause," it provides that the Department shall consider the degree of risk to an employee's health, safety and morals in determining suitability of the work. Miss. Code Ann. Section 71-5-513 (A) (3) (a) (Supp. 2005). Thus, other than provided in this statute, what circumstances constitute good cause must be decided on a case-by-case basis.

Since we must review the circumstances of each case when considering whether or not the claimant refused an offer of suitable work, it is helpful to look to previous decisions on this issue. The Mississippi Supreme Court has previously held that the following examples are refusals of suitable work:

1) Work offered to employees thirty-five to forty-three miles away, (South Central Bell Telephone Co. v. Miss. Employment Security Comm'n, 357 So. 2d 312 (Miss. 1978));
2) Employees called back to work after a lay-off at a lower rate of pay, (Mississippi Employment Security Comm'n v. Swilley, 408 So. 2d 61 (Miss. 1981)); and
3) Employee's refusal to accept a change of employment from the night shift to the day shift. ((Melody Manor, Inc. v. McLeod, 511 So. 2d 1383 (Miss. 1987)).

Under this line of case law, it is clear that an offer to return to your previous position qualifies as suitable work within the meaning of Mississippi Code Annotated Section 71-5-513(A)(3).

In the case *sub judice*, Ms. Hollingsworth, by her own admission, was asked to return to work and she refused to do so. (R. Vol. 2p. 19-20). Ms. Hollingsworth's reason for not returning was that she did not have adequate childcare. (R. Vol. 2 p. 20). However, the Employer and the Claimant testified that one of the doctors personally called Ms. Hollingsworth and told her she could bring her children to work with her until school started. (R. Vol. 2 p. 19-20). The Claimant still refused to return to work. (R. Vol. 2 p. 20).

The Claimant argues that the "application of the statutory and case law regarding suitable employment should be viewed within the context of the catastrophic circumstances facing Mrs. Hollingsworth due to the impact of Hurricane Katrina on the safety and health of her worksite." (See Appellant's Brief p. 12). The Claimant goes on to argue that the offer of work was not suitable in that it consisted of different duties, different hours and different working conditions. However, if the facts are examined, as the Claimant suggests, in light of the special circumstances involving Hurricane Katrina, this argument lacks merit.

First, the Claimant argues that the post-Katrina duties would include pulling up carpet and cleaning debris and that there was no telephone service or electricity. The record does not support this argument. The Employer representative testified that the phones were working approximately two to three weeks after the storm and the electricity was functioning by the second week. (R. Vol. 2 p. 18). The Employer also testified that they pulled up the carpet during the week of September 6, which was the second week after the hurricane. (R. Vol. 2 p. 18). Ms. Hollingsworth was not asked to return until September 16th, [1] some three weeks after the hurricane struck the coast. (R. Vol. 2 p. 19). The Employer representative testified that the Claimant was needed mostly to help walk-in patients who had lost glasses or contacts, which was in-line with her pre-Katrina duties. (R. Vol. 2 p. 19). Furthermore, the Employer testified that the Eyeglass factory had twenty employees, all of which returned to work. (R. Vol. 2 p. 24-25). None of these employees felt that the working conditions were a risk to their health, safety or morals.

[1] There is some discrepancy in the record as to whether or not the claimant was asked to return on September 16, or October 3. Regardless, the record clearly shows she was not asked to return until well after the phones/electricity were working and after most of the debris clearing had been done.

This fact alone discredits Ms. Hollingsworth's argument that the environment was not safe.

Furthermore, the Employer made every effort to accommodate Ms. Hollingsworth, even offering to allow her to bring her children to work with her. (R. Vol. 2 p. 19-20). In fact, the only difference in Ms. Hollingsworth's duties was that she was asked to work until 5:30 p.m., which added an additional three and one-half hours to her regular schedule. (R. Vol. 2 p. 20). The court has previously held that requiring an employee to work different shifts is not good cause to refuse an offer of work. See Melody Manor, Inc. v. McLeod, 511 So. 2d 1383 (Miss. 1987). Moreover, even if the Claimant was required to assist with debris removal, work without telephones, or asked to assist with any reasonable duty outside the normal scope of her position, this would have been a reasonable expectation of the Employer given the unusual circumstances following the hurricane.

Finally, Mississippi Code Annotated Section 71-5-513 (A)(1)(a) (Supp. 2006) provides that quitting work due to "marital, filial, and domestic circumstances and obligations" is not deemed good cause to voluntarily leave your employment. While the issue in this case is refusal of work, it seems clear that the same line of reasoning would follow. Ms. Hollingsworth refused to return to work because she could not find adequate childcare. This is not "good cause" under the law.

The Appellant's argument that the AAO and Board of Review's decision are not supported by substantial evidence is unpersuasive considering the testimony presented at the hearing before the Administrative Appeals Officer. This Honorable Court should affirm the decision of the Board of Review.

III. The Claimant is obligated to repay the overpayment of benefits received under Miss. Code Ann. Section.

Mississippi Code Annotated Section 71-5-19 provides the following:

> [a]ny person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact, irrespective of whether such nondisclosure or misrepresentation was known or fraudulent, or who, ***for any other reason*** has received any such benefits under this chapter, while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the department, either be liable to have such sum deducted from any future benefits payable to him under this chapter or shall be liable to repay to the department for the Unemployment Compensation Fund a sum equal to the amount so received by him; and such sum shall be collectible in the manner provided in Sections 71-5-363 through 71-5-383. [emphasis added].

In the present case, the Claimant received benefits in the amount of $210.00 a week for the weeks ending September 12, 2005, through December 3, 2005. (R. Vol. 2 p. 37-38). It was determined that the Claimant was not entitled to these benefits because she refused an offer of suitable work. (R. Vol. 2 p. 37-38). An overpayment was accessed against the claimant and the AAO determined that she was obligated to repay this amount, plus any interest that may accrue on the unpaid balance. (R. Vol. 2 p. 37-38).

The Claimant cites to the previous decisions of this Court and the Mississippi Supreme Court which held that the Department may directly pursue collection measures against a claimant, only upon a finding that: "(1) [a] person received benefits, (2) at a time when he was ineligible, (3) by reason of nondisclosure or a misrepresentation of a material fact, (4) made by that person or another, (5) irrespective of fraudulent intent or knowledge of the omitted or misrepresented fact." Caraway v. Miss. Empl. Sec. Comm'n, 826 So. 2d 100, 102-3 (P8) (Miss. Ct. App. 2002) (quoting Miss. Empl. Sec. Comm'n v. Sellers, 505 So. 2d 281, 283 (Miss. 1987)). Claimant also references this

Court's recent decision in Acy v. Miss. Empl. Sec. Comm'n, 2007 Miss. App. Lexis 54, Feb. 6, 2007.

With regard to this test, MDES would like to point out that a portion of the statute this test is taken from is completely omitted. Section 71-5-19 clearly states that the Department may set up an overpayment "***for any other reason***" if it is determined that the claimant received benefits for any period for which he was not entitled. The statute clearly gives this Department the authority to deduct any overpayment amount from future benefits ***or*** seek repayment. The intention of this statute is to make the Unemployment Compensation Fund whole. If MDES is not allowed to pursue collection of overpayments, it would defeat the entire purpose of this statute. MDES respectfully asks this Court to reexamine the language of Section 71-5-19 in conjunction with the previous holdings in Caraway, Sellers and Acy. MDES asserts that the test as it has been followed defeats the legislative intent of the statute and affects the Department's ability to maintain the Unemployment Compensation Fund.[2]

Moreover, if this Court continues to uphold this test as the standard, the Department asserts that this test can be met in the case at bar. Both parties concede that element number one has been met and MDES is certain that there is substantial evidence to support element number two. The Department further asserts that at the time Ms. Hollingsworth filed her claim, she was required to state her reason for separation. At this time she did not indicate that she refused an offer of work. It was not until MDES was notified by the Employer that it was discovered that an offer of work had been refused.

[2] Recently, S.B. No. 2448 was signed into law by Governor Haley Barbour. This bill went into effect on July 1, 2007. This bill made changes to Section 71-5-19 which will affect the previous holdings in Caraway, Sellers and Acy. MDES recognizes; however, that these changes were not in effect when Ms. Hollingsworth's overpayment was set up.

MDES asserts that this nondisclosure by the Claimant satisfies elements three, four and five.

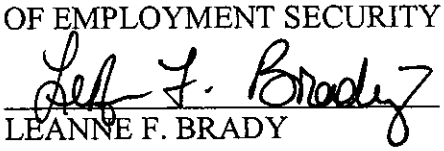
Finally, if this Honorable Court finds this test has not been met, MDES still asserts that the Claimant refused a suitable offer of work and the Department should be allowed to offset any future benefits under 71-5-19.

CONCLUSION

There is substantial evidence to support the findings of fact and the opinion of the Board that the Claimant refused an offer of suitable work, is disqualified from receiving benefits and is obligated to repay the assessed overpayment under Mississippi Employment Security Law. Thus, this Honorable Court should affirm the decision of the Board of Review in this matter.

Respectfully submitted this the 12th day of July, 2007.

MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY



LEANNE F. BRADY
SENIOR ATTORNEY

LEANNE F. BRADY
SENIOR ATTORNEY/MDES
MS. BAR NO. [redacted]
P.O. BOX 1699
JACKSON, MS 39215-1699
(601) 321-6074 - phone
(601) 321-6076 - facsimile

CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to:

Scott O. Nelson
Counsel for Amy R. Hollingsworth
Post Office Drawer 1368
Pascagoula, MS 39568-1368

Eyeglass Factory
4505 Hospital Street
Pascagoula, MS 39581

Honorable Robert B. Krebs
Circuit Court Judge, Jackson County
Post Office Box 998
Pascagoula, MS 39568-0998

This the 12th day of July, 2007

Respectfully Submitted,

LeAnne F. Brady
Senior Attorney

LEANNE F. BRADY
SENIOR ATTORNEY/MDES
MS. BAR NO. 100793
P.O. BOX 1699
JACKSON, MS 39215-1699
(601) 321-6074 - phone
(601) 321-6076 - facsimile