

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

TOM CERRATO

APPELLANT

VS.

CAUSE NO. 2006-CC-01979

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

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. Tom Cerrato, Appellant
3. LeAnne F. Brady, Esq., Attorney for Appellee
4. Albert Bozeman White, Esq., Attorney for Appellee
5. Radio Shack, Employer
6. Honorable Richard Smith, Washington County Circuit Court Judge



ALBERT BOZEMAN WHITE
ATTORNEY FOR APPELLANT

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**BRIEF OF APPELLEE/DEFENDANT
MISSISSIPPI DEPARTMENT EMPLOYMENT SECURITY**

STATEMENT OF ISSUES

1. Whether Tom Cerrato's Appeal of the Notice of Nonmonetary Decision dated and mailed February 27, 2006, was untimely pursuant to M.C.A. Section 71-5-517 (Rev. 1995), such that the Board of Review's dismissal, and Circuit Court's Order affirmance of the Board, were proper?

2. Whether the Board of Review's decision, and Circuit Court's decision, that Tom Cerrato failed to appeal the Nonmonetary Decision timely, and failed to prove good cause for filing his appeal untimely, were supported by substantial evidence?

STATEMENT OF THE CASE

Tom Cerrato [hereinafter also "Claimant"] was employed by Radio Shack [hereinafter also "Employer"] as a Store Manager from September 3, 2003, through February 3, 2006. (R. Vol. 2 p. 1). He was terminated for violating the Employer's policy against fraternization. (R. Vol. 2 p. 3).

After his termination, Mr. Cerrato filed for unemployment benefits. A Claims Examiner investigated. (R. Vol. 2 p. 3-4). The Claims Examiner interviewed Mr. Cerrato; and an Employer representative. (R. Vol. 2 p. 3-4). The Employer representative stated the circumstance leading to Mr. Cerrato's termination arose when Mr. Cerrato began dating a subordinate employee. The Employer discovered that he was dating one of his employees when a physical altercation occurred at the Radio Shack store between the employee Mr. Cerrato was dating and a co-worker.

An investigation revealed that Mr. Cerrato had a personal relationship with a subordinate employee for three months. The Employer's policy required that an employee dating a subordinate employee must inform the company within one month, so that a transfer of one of the employees could be made. Mr. Cerrato failed to do so; and Mr. Cerrato did not deny being aware of the policy. Violation was also grounds for immediate termination. Mr. Cerrato admitted that he had dated the employee, and that he told the employee that her boyfriend had been convicted for robbery, which led to the altercation.

Based upon this investigation, the Claims Examiner found that Mr. Cerrato was terminated for disqualifying misconduct pursuant to M.C.A. Section 71-5-513 (A) (1) (b). (R. Vol 2 p. 5).

The Claims Examiner's letter giving Mr. Cerrato notice of the decision denying him benefits was mailed February 27, 2006. (R. Vol 2 p.5). This letter also informed Mr. Cerrato that he had **"fourteen (14) days from the mailing date shown"** to protest by filing an appeal at the nearest

MDES office, or by mailing to the address given therein. (R. Vol 2 p.5). However, Mr. Cerrato did not file his Notice of Appeal until March 24, 2006, being eleven (11) days late. (R. Vol 2 p. 5).

A hearing was noticed for the sole purpose of determining whether Mr. Cerrato's appeal was timely filed; or whether he had good cause for filing late. (R. Vol 2 p. 9-10). Mr. Cerrato appeared and testified. (R. Vol 2 p. 11-29).

Based on the record, the Administrative Law Judge [hereinafter also "ALJ"] found that pursuant to M.C.A. Section 71-5-517 (Revised 1995), Mr. Cerrato had fourteen days from the Claims Examiner's decision to appeal; and that his appeal was untimely. (R. Vol 2 p. 30-31). Further, the ALJ found that Mr. Cerrato did not show good cause for missing the fourteen day appeal deadline. Thus, the ALJ dismissed his appeal as untimely. (R. Vol 2 p. 30-31).

The ALJ's Decision in pertinent part was as follows:

An initial claim for benefits under the Mississippi Employment Security Law was filed by the above-named individual, hereinafter called claimant, effective February 5, 2006. On February 27, 2006, the Claims Examiner disqualified the claimant from the receipt of benefits under Section 71-5-513A(1)(b) of the Law on the grounds that the claimant was discharged for misconduct connected with the work. The claimant filed Notice of Appeal therefrom on March 24, 2006. A telephone hearing before the Administrative Law Judge was held on April 11, 2006, at which the claimant participated

Based upon the record, testimony, and certain documents of evidence, the Administrative Law Judge finds as follows:

There was printed on the Notice of Nonmonetary Decision the following statement:

IF YOU WISH TO PROTEST THIS DECISION, you may ask for a reconsideration or file a Notice of Appeal within fourteen (14) days after date of mailing to you. This appeal may be filed at the nearest Claims Office or by a letter addressed to the Mississippi Department of Employment Security, P. O. Box 23088, Jackson, Mississippi, 39225-3088.

Section 71-5-517 of the Mississippi Employment Security Law provides that a claimant may file an appeal from an initial determination or an amended initial determination within fourteen (14) days after date such notification was mailed to the last known address. The Law contains no provision for the extension of such time for good cause or holidays.

In this case, the Notice of Nonmonetary decision was mailed to claimant at the last known address on February 27, 2006. The appeal was filed on March 24, 2006, which was not within the time limit prescribed in the Law, and good cause for failing to meet that time limit has not been established. The decision of the Claims Examiner therefore has become final and the Administrative Law Judge is without jurisdiction in the matter. The appeal is consequently dismissed. (emphasis added).

(R. Vol 2 p. 30-31).

Mr. Cerrato appealed to the Board of Review. (R. Vol 2 p. 33). The Board affirmed adopting the ALJ's Fact Finding and Opinion. (R. Vol 2 p. 35).

On June 9, 2006, Mr. Cerrato then appealed to the Circuit Court of Washington County. (R. Vol. 1 p. 1-2, 5-6). The MDES filed its Answer and the record transcript on August 14, 2006. On October 6, 2006, the Honorable Richard A. Smith, Circuit Court Judge, affirmed the decision of the Board of Review. (R. Vol. 1 p. 15). Mr. Cerrato then appealed to this Honorable Court. (R. Vol. 1 p. 16).

SUMMARY OF THE ARGUMENT

Procedure in an unemployment benefit case before the Mississippi Department of Employment Security [hereinafter "Department" or "MDES"] is governed by M.C.A. Section 71-5-517 (Rev. 1995) et.seq. A claimant or employer unhappy with a MESC Claims Examiner's decision has fourteen days from the dated mailed to appeal. M.C.A. Section 71-5-517 (Rev. 1995); Wilkerson vs. Mississippi Employment Security Commission 630 So. 2d 1000 (Miss. 1994); Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979). The Claims

Examiner's Notice of Nonmonetary Decision was mailed to Mr. Cerrato at his correct mailing address. Mr. Cerrato timely received and read the letter dated February 27, 2006. (R. Vol 2 p. 5). The notice letter informed him that he had fourteen days from the date mailed to appeal. (R. Vol 2 p 5). However, he did not appeal until March 24, 2006, being eleven (11) days late. (R. Vol 2 p. 6).

Mr. Cerrato stated that he did not get his mail because he had moved. However, he admitted that he did not inform the Department of a forwarding address, until he faxed his appeal on March 23, 2006. (R. Vol 2 p. 14-15).

Since there is no dispute that Mr. Cerrato's appeal was untimely filed, and since he has not presented good cause under the case authorities, the ALJ and Board of Review's decisions, and the Circuit Court's Order affirming the MDES decisions, are supported substantial evidence, and should be affirmed.

ARGUMENT

Mr. Cerrato's appeal is governed by M.C.A. Section 71-5-531, (Rev. 1995), which provides for an appeal 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 and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. (emphasis added). Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (Miss. 1992); Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

A rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Security Commission,

639 So.2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

At the hearing, Mr. Cerrato confirmed his address. He confirmed that the Claims Examiner's decision was mailed to the address given the Department by him on his Initial Claim. (R. Vol 2 p. 14-15). This letter was admitted into evidence as Agency Exhibit 1. (R. Vol 2 p. 21).

Mr. Cerrato stated he did not appeal sooner than March 24, 2006, because he had moved and did not get the Notice Letter until after March 24, 2006. (R. Vol 2 p. 16). He stated that he appealed on March 24, 2006, when he called to inquire about his claim. However, since the Nonmonetary Decision was mailed to the last known address provided to the MDES as of that time, Mr. Cerrato was afforded all of the notice of the Nonmonetary Determination to which he was entitled; and non-receipt is insufficient to prove good cause under these circumstances. Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979).

M.C.A. Section 71-5-517 (Rev. 1995) sets out the applicable appeal time, providing in pertinent part, to-wit:

The claimant or any party to the initial determination or amended initial determination **may file an appeal from such initial determination or amended initial determination within fourteen (14) days after notification thereof**, or after the date such notification was mailed to his last known address. (emphasis added).

Pursuant to this statute, Mr. Cerrato was afforded all of the notice of the nonmonetary determination to which he was entitled; and his appeal was not timely filed. The notice letter was mailed to his correct address; he received it; read it; and apparently understood that he needed to appeal within fourteen days of the mailing date, which gave him until March 13, 2006.

Since notification was mailed to his correct mailing address, the case of Wilkerson vs. Mississippi Employment Security Commission, 630 So. 2d 1000 (Miss. 1994) is on point; and controls as to calculating the appeal deadline. In Wilkerson, the Supreme Court held that **when notification is by mail, the fourteen day time period began running from the mailing date.** Id. at 1002. Further, while holding that an appeal filed **one** day late was untimely, the Court in Wilkerson stated that **the fourteen day time period as set by statute is to be strictly construed.** Id.; Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

Regarding the good cause issue, the Supreme Court and Court of Appeals have generally addressed that issue. In Holt v. Mississippi Employment Security Commission, 724 So.2d 466 (Miss. App Ct. 1998), the Court stated that good cause must be established by affirmative proof. The Court in Holt also indicated that a “good cause” showing must provide sufficient legal basis to excuse the late filing.

In that regard, since Mr. Cerrato did not provide the Department a new or forwarding address before the Nonmonetary Decision was made and mailed, he cannot show good cause for untimely appealing. See Powell v. Mississippi Employment Security Commission, 787 So.2d 1277 (Miss. 2001)(Circuit Court’s allowance of untimely appeal based upon claimant’s assertion of “unforeseen circumstances” was insufficient proof of good cause); Cane v. Mississippi Employment Security Commission, 368 So.2d 1263 (Miss. 1979)(where notice is **not** mailed to the last known address, good cause for late filing is shown).

CONCLUSION

Since there is ample evidence to support the decision of the Board of Review in holding that Mr. Cerrato did not timely file his appeal, and did not establish good cause for untimely appealing, the Board's dismissal of Mr. Cerrato's appeal should be affirmed by this Honorable Court.

RESPECTFULLY SUBMITTED, this the 25th day of May, 2007.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY



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CERTIFICATE OF SERVICE

I, Albert Bozeman White, Attorney for Appellee, Mississippi Department of Employment Security, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to the following, to-wit:

Mr. Tom Cerrato, Plaintiff/Appellant
4419 Lakeview Road-N
Little Rock, AR 72116

Radio Shack, Employer
300 Radio Shack Circle
Fort Worth, TX 76102-1966

Honorable Richard Smith
Circuit Court Judge
Post Office Box 1953
Greenwood, MS 38935-1953

THIS, the 25th day of May, 2007.



ALBERT BOZEMAN WHITE