IN THE SUPREME COURT OF MISSISSIPPI

Theresa L. Cummings	APPELLANT
v.	Case #2006-CC-02030
Mississippi Department of Employment Security and Luckett Tyner Law Firm	APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF
CHOCTAW COUNTY, MISSISSIPPI

APPELLANT'S REPLY TO AGENCY APPELLEE'S BRIEF

ORAL ARGUMENTS NOT REQUESTED

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APPELLANT'S REPLY TO AGENCY APPELLEE'S BRIEF

The Agency Appellee has mischaracterized the facts and evidence of this case. Further, it has made a habit of confounding the employment contract which existed between the parties, employment law, and unemployment eligibility requirements. Rather than respond to each issue as presented in the Agency Appellee's brief, the Appellant will outline and discuss each referenced issue.

CIRCUIT COURT

On page 4 of its brief, the Agency Appellee correctly notes that the "Clerk received this Motion on July 26, 2007" sic [2006] and the Agency Appellee acknowledged this fact. However, there is no support for the statement that the Clerk did not file the Motion because no case was pending..... There is no testimony or documentary evidence which supports this statement. The Clerk's letter (tr. 6) mentions a civil cover sheet and decision letter, neither of which is required to perfect filing the appeal and neither is required according to MCA §71-5-531.

The Appellant completed one form of an appeal and clearly identified herself as the petitioner. Neither the Circuit Court nor the Appellees indicated a lack of understanding regarding the Appellant's intent. Though the form may be deficient and an amendment would have improved it, there was no doubt that all relevant parties were put on notice of the appeal.

The Agency Appellee utilizes Wilkerson vs. Mississippi Employment Security, 630 So 2d 1000 at 1001 (Miss, 1994) to show that there is a strict, 20-day time limit for appeal and the Appellant does not dispute this fact. However, Wilkerson does not specify the form of the appeal. The Agency Appellee is an administrative agency created by

statute and has only that power granted to it. Wilkerson at 1001. Therefore, the Agency Appellee cannot graft additional unnecessary requirements as to form unless the statutes grant it that authority. Further, MCA §71-5-531 states that judicial review may be secured by commencing an "action," it does not specify that a "petition" is required.

The Appellant asserts that her Motion for Extension of Time and Notice of Appeal was timely filed, pursuant to M.R.C.P. 3(a) which states: "A civil action is commenced by filing a complaint with the court. .." M.R.C.P. 5(e) states "The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. Filing may be accomplished by delivering the pleadings or other papers to the clerk of the court or to the judge, or by transmitting them by electronic means." Thus, the Appellant's completion of the cover sheet should relate back to July 26, 2006.

On page 6 of the Agency Appellee's brief, it misstates the holding of Helmert and confuses the arguments therein with the court's actual ruling. Helmert, 842 So 2d 1287 (Miss. 2003) at 1289 ¶11 indicates that an "action is commenced by filing a complaint." Thus, the case was pending because an action had been commenced and all parties were on notice.

On page 8 of its brief, the Agency Appellee quotes Allen vs. Mississippi Employment Security Commission, 639 So 2d 904 (Miss. 1994) when stating that the appeals court must not reweigh the facts nor insert its judgment for that of the agency. The Appellant is of the opinion that the same proposition should apply to the Board of

Review. Therefore, the Board of Review should not reweigh the facts or insert its judgment for that of the Administrative Appeals Officer.

The Appellant agrees 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." The appeals court has three (3) duties when considering an appeal: first, ascertain if fraud occurred; second, confirm that the findings of fact are supported by substantial evidence; and finally, confirm that the correct law has been applied. Booth vs. Mississippi Employment Security Commission, 588 So. 2d 422 (Miss. 1991) at 425 "Accordingly, this Court should review the record to determine whether, as a matter of law, the Board's fact-finding is supported by substantial evidence. If the evidence is sufficient, then this Court should determine whether, as a matter of law, Booth's actions constitute misconduct." The Administrative Appeals Officer was the only decision maker who reviewed the evidence and determined that substantial evidence did not exist to warrant misconduct. Further, she was the only one who utilized the correct law in the case sub judice. The Claims Examiner and Board of Review used the Employment Contract to justify the Appellant's termination and to disqualify her for unemployment benefits. Neither they nor the Circuit Court applied the law of misconduct as established by Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982), which has been conspicuously ignored by the Appellees and the Circuit Court.

REPEATED, GROSS NEGLIGENCE and WILLFUL, WANTON DISREGARD

In the middle of page 6 of the Agency Appellee's brief, the Agency Appellee makes a tremendous leap to discuss "repeated, grossly negligent job performance."

Repeated negligent job performance and gross negligent job performance are not at issue in this case, have not been alleged by any party and have not been opined or found by any decision-making authority herein. Further, the cases relied upon by the Agency Appellee establish a higher standard than that provided by the record and evidence of this case. Shavers vs. Mississippi Employment Security Commission, 763 So 2d 183 at 185 – 186 (Miss. COA 2000) cites Wheeler in stating "failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered "misconduct" within the meaning of the statute." Shavers was reprimanded five times and performed a job that did not require skills. In the case sub judice, the Employer stated that the Appellant 'just didn't get it." (tr. 8, 59, 145)

On page 7, the Agency Appellee indicates that the Appellant's work needed improvement. "Needing improvement" is not synonymous with "repeated" or "grossly negligent" poor job performance. The Employer Appellee said it was taking too long to get the work. (r. 7) Additionally, the Agency Appellee states that witness testimony "established that her work performance became unsatisfactory and continued even after counseling...." There is no support for this statement in the record. Thus, the witnesses" are in no position to "establish" a foundation for "counseling or unsatisfactory work performance." (Tr. 50-51)

The Agency Appellee discusses intentional or grossly negligent violations of reasonable Employer policies, instructions, and reasonable standards of behavior constitute misconduct. Neither "intentional" nor "grossly" negligent violations has been discussed or established in this case. The record does not indicate or confirm that the

Appellant committed any behavior which constitutes misconduct or violated any Employer policy or instruction. Further, the Employer has not provided evidence of policies of any kind and certainly none which constitute misconduct as defined by Wheeler. According to Mississippi Employment Security Commission, benefit procedural handbook, § 2 F (2) (Rev. 1995) as quoted in McClinton v. Mississippi Dept. of Employment Security, 2006 So.2d (2005-CC-01961-COA), "an employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced." Thus, this issue is unsupported by the evidence herein and irrelevant to the case sub judice.

The Agency Appellee continues and states that "the Employer's proof indicated that she disregarded instructions on completing an assignment and other duties such as refusing to take a phone call from an important client and refusing to meet with a client." The Agency Appellee provides no evidence to support the statement that the Appellant disregarded instructions on completing an assignment. As a matter of fact, the Employer indicated that he changed the instructions for the referenced assignment several times (tr. 32) and further indicated that the Appellant tried to provide him with the requested assignment. (tr. 33) The Appellant disputes the characterization of her alleged failure to take a phone call or meet with a client. Still, neither isolated incident nor both isolated incidents equal repeated, gross negligent job performance and the Employer never mentioned anything about such allegations to the Appellant. (tr. 50-51) The Employer did not investigate the allegations and did not bring them to the Appellant's attention

before her termination. (tr. 50-51) Again, "failure in good performance as the result of inability or incapacity, or inadvertence and ordinary negligence in isolated instances ... [are] not considered 'misconduct' within the meaning of the statute." Wheeler

The Appellant doesn't disagree with the Agency Appellee's statement concerning case authorities which establish that willful and wanton violations of reasonable Employer instructions, and reasonable standards of behavior, constitute disqualifying misconduct. However, the record in the case sub judice does not reflect willful and wanton violations or falsification of time cards, as in Mississippi Employment Security Commission vs. Percy, 641 So. 2d 1088 (Miss. 1994) but waffling regarding the reason the Appellant was terminated. The Claims Examiner and the Board of Review indicated that the Appellant was terminated "for failure to perform the work up to the Employer's standards because it constituted misconduct." (tr. 8, 159) There are no documents in this record to support a finding of misconduct by any decision-making party. The Employer stated that the Appellant quit, etc. (tr. 8) The Employer did not notify the Appellant that her behavior was grossly negligent in any of his written communications to the Appellant neither on October 12, 2005 (tr. 74) nor November 30, 2005 (tr. 75) or any alleged "counseling" session(s) between the parties. The Employer did not mention that the Appellant's behavior indicated a willful and wanton violation of reasonable instructions and specified actions which supported this allegation within his written communications to the Appellant on October 12, 2005 (tr. 74) or November 30, 2005 (tr. 75). Again, the Agency Appellee continues to confuse the Employer Appellee's "cause for termination" (failure to meet the employer's standards) with the Supreme Court's definition of misconduct and therefore the eligibility requirements for unemployment benefits. Gross

negligence is defined as "the intentional failure to perform a manifest duty in reckless disregard ..." Black's Law Dictionary 1033 (6th ed. 1990). It is not at issue in this case and is not supported by the record.

Finally, the Agency Appellee states that the Employer's "proof reflects willful and wanton disregard for the Employer's interest." The Employer's allegations are not the same as proof and these allegations do not prove a willful and wanton disregard for the Employer's interest. Further, the Employer has had ample opportunities to make such a claim and failed to do so on the occasions in which the Employer has responded to the Agency Appellee and relevant Courts. Therefore, this statement represents another mischaracterization of the facts and evidence of this case.

WITNESSES

Next, the Agency Appellee reminds the Court of the testimony provided by the Employer's witnesses. Employer's witness, Katrina Neal, stated that the Appellant would not answer a call because she was leaving the firm, but she provided no evidence to support her testimony, not even the alleged e-mail which the Employer Appellee promised. (Tr. 49-50, 82). The Appellant denied that the alleged conversation took place. Further, this isolated allegation does not constitute misconduct as defined by Wheeler.

The employer's witness, Molly Barbieri, testified that the Appellant "refused" to see a client. Again, this is a mischaracterization. This witness did not recall that the Appellant did not want to misuse the client's time and researched why the complaint listed a particular amount in damages before contacting her with that information. Tr. 129-130. This was an isolated incident which the Appellant discussed with the Employer at the time it occurred.

Ms. Barbieri also asserts that the Appellant asked her to complete the Appellant's work assignments, specifically the Kennamore matter. This assertion is more than a simple mischaracterization which has not and can not be substantiated by the evidence. The Kennamore assignment, as verified by the employer, was different (tr. 33) and included rather large amounts of medical bills (tr. 118). Further, the employer made several changes to the assignment (tr. 32). Still, the Appellant tried to comply with his requests (tr. 33), even though the Employer didn't know if his office had all of the medical records before the Appellant's termination.

Diana Hester testified that the Appellant was "trying to pass off work to myself and some of the other assistants. She wasn't taking phone calls on cases that she was familiar with and working on. That may have been pretty much it." Tr. 123. When asked how she arrived at the conclusion that the Appellant was trying to pass off work and if the Appellant ever did this to her, personally, she replied, "[I] know she did. I don't believe, I don't remember the exact case." Tr. 123-4 Further, she was "not exactly sure" if the Appellant did this on more than one occasion or if this was a single incident." Tr. 124 The Appellant can only deny such allegations because they lack any veracity.

The employer's witnesses have not provided evidence which supports misconduct. The Appellant denies each and every allegation as stated and characterized by the Employer Appellee and the Agency Appellee. None of these witnesses could provide sufficient evidence to support their testimonies and the employer provides no factual evidence of support --- simply statements. The Appellant denied the allegations and repeatedly testified that she did her best. (Tr. 62) She went to work early and left late in efforts to produce a quality work product.

Ms. Collins' testimony was used to show that the Appellant worked weekends, came in early, and left late in an effort to "catch on." The Agency Appellee uses this testimony to mischaracterize the Appellant and to draw unfair inferences to conclude that the employer was dissatisfied with the Appellant's hours or that the Appellant failed to work the necessary hours in order to complete assignments by the requested deadline. However, the Appellees did not provide evidence or documentation of a single deadline which the Appellant missed. Further, the evidence shows that the Appellant attempted in good faith to perform the assigned work satisfactorily and the Appellant's witness verified, based on personal knowledge, that the Appellant went to work early, left late and took work home. Tr. 136–140.

MISCONDUCT

On page 2 of its brief, the Agency Appellee erroneously states that the Appellant resigned on October 17, 2005 effective January 2, 2006. The Appellant provided a letter of resignation on and dated for September 6, 2005. (tr. 86). Additionally, this Appellee states that the Claims Examiner disqualified the Appellant for "committing misconduct under the Contract for failing to perform up to the Employer's expectations." However, Section 7 of the Employment Contract does not address misconduct as it relates to Mississippi law but grounds for termination according to this employer. (tr. 67-68) Whether the employment contract justified termination has nothing to do with eligibility for unemployment benefits. According to Mississippi law, the employer was legally permitted to terminate the Appellant, but such termination does not meet the standards of misconduct as established by this Honorable Court and its ruling in Wheeler.

The Agency Appellee reiterates the Board of Review's Findings of Fact and

Opinion on page 3 of its brief. The Appellant emphasizes that "failing to perform the work up to the standard required by the employer" does not equal misconduct and this Appellee has confused the two concepts. Within the same paragraph, the Agency Appellee states that the "employer verbally warned her of her poor job performance." However, the employer explicitly states that he did not warn the Appellant, but "talked to her," tr. 98 (or elsewhere "counseled her"). The Board of Review repeats this error at the end of this paragraph, but goes on to state that the Appellant "had demonstrated the ability to perform the work in accordance to the employer's standards." This statement contradicts the Employer Appellee's testimony. (tr. 8, 59, 145) Further, the Board of Review opines that the Appellant's "failure to perform the work constituted misconduct connected with the work." Thus, the Board of Review gave an opinion which is not supported by the facts, evidence, or law and erroneously equates failure to perform the employer's work with misconduct as defined by Wheeler --- they are not the same.

Also on page 10 of the Agency Appellee's brief is reference to the Employer's testimony that the Appellant "appeared to lose interest after her resignation." The Employer admitted that he did not observe the Appellant's work habits. The record reflects that the Appellant considered her job and her employer when she went to work early, stayed late, and took work home.

The Employer further alleges that the firm was losing money.....and after "looking at the November billings that he and Mr. Tyner decided on November 30, 2005, to terminate Ms. Cummings' Contract as of December 1, 2005." Tr. 18. If misconduct is the honest and actual reason for the Appellant's termination, why does the Employer need to look at the November billings or any other billings? Billings do not equal

misconduct as defined by Wheeler. The truth of this case is that the Appellant was terminated for monetary reasons alone (tr. 18, 22) --- not misconduct as the Claim's Examiner, Board of Review, and the Agency Appellee attempt to support with varied, wide-ranging, irrelevant, and erroneous statements.

The Agency Appellee indicates on page 11 of its brief that the Employer Appellee was questioned as to whether the Appellant was reprimanded or warned. The Agency Appellee goes on to repeat erroneous information which the Employer Appellee testified to at the hearing and which was denied, on the record, by the Appellant. The Employer Appellee did not indicate that he reprimanded or warned the Appellant. When asked if he warned the Appellant, the Employer stated, "...warned is a strong word. I talked to her about it." Tr. 98. Further, the Employer Appellee did not assert that he gave the Appellant any indication that her job was in jeopardy. Tr. 23 As a matter of fact, he and Mr. Tyner decided to terminate the Appellant after looking at the November billings. Tr. 18.

On page 13, the Agency Appellee mentions that the Appellant always had a baseball game playing. This statement is a clear, concise example of the pattern of innuendo and smearing of the Appellant's character with irrelevant testimony and magnification of irrelevant facts or alleged facts in an attempt to support a case for misconduct. The Employer Appellee never indicated that this behavior was in violation of a policy, instruction or reasonably expected behavior. As a matter of fact, the Employer Appellee did not comment on this fact until the hearing. The Administrative Appeals Officer asked the Employer if the Appellant was told she could not listen to the games and he said "no." (tr. 59) If this or any other of the Appellant's behavior(s)

violated office policy, the Employer Appellee had an obligation to make certain that the Appellant was aware of the policy before using such violations as grounds for termination. Further, the Claims Examiner, Administrative Appeals Officer, Board of Review, and Circuit Court had a duty to confirm that policies were established, that the Appellant was aware of the policies, that the policies were fair and in effect for all employees, and that the Appellant violated the policies. No policies were in effect and no one has provided substantial evidence that the Appellant violated such.

In terms of reviewing medical records, the Employer Appellee can only speculate about what work the Appellant did at Legal Services. The Employer Appellee and the Agency Appellee mischaracterize the Appellant's experience prior to her employment with the Employer Appellee as well as the work routinely conducted at Legal Services. The Appellant denied having experience doing much of the work which she was required to perform at Luckett Tyner Law Firm and (tr. 36-37, 61-62) and the Employer Appellee recognized that Appellant did mostly Chancery work prior to her employment with his firm. (tr. 102) The Employer Appellee states "[s]he couldn't grasp it.... But she just did not meet our expectations of a practicing attorney where she was working, and that's here at this office." (tr. 59) Even the employer recognizes that his standards are subjective and may well be very different from those of another office. Still, the Agency Appellee and the courts are required to apply an objective standard.

The Appellant's failure to meet the Employer Appellee's expectations does not meet the statutorily defined definition of misconduct especially if the Appellant tried in good faith to comply with requests. However, this case has centered on meeting the employer's expectations. The employer's expectations meant making money and the

Appellant allegedly failed to meet those arbitrary and capricious expectations. Again, the Appellant's failure to meet the Employer Appellee's expectations does not mean that the Appellant committed misconduct.

The Agency Appellee repeats that Section 7 of the Employment Contract between the parties indicates that the employer could terminate the Contract without notice for good cause, which was specified as including neglect and failure to meet expectations of a practicing attorney. Again, the Employment Contract (between the parties) does not include the statutorily defined misconduct or eligibility requirements for unemployment benefits. The Employer indicated that the Appellant 'failed to meet the expectations of a practicing attorney where she was working, and that's here at this office." (tr. 59) What is expected of a practicing attorney at Luckett Tyner Law Firm is apparently quite different from what is expected of practicing attorneys in other offices. Again, failure to meet the employer's expectations does not meet Wheeler's definition of misconduct, which determines whether the Appellant is eligible for unemployment benefits.

MISCELLANEOUS

The Agency Appellee provides a string of cases on page 18 of its brief. Besides those cases already addressed or hereafter addressed, the Appellant fails to recognize the relevance of the string cite.

The Agency Appellee mischaracterizes and misapplies Claiborne vs. Mississippi Employment Security Commission 872 So 2d 698 (Miss COA 2004). The facts of the case sub judice do not pertain to prolonged or persistent failure to perform any duties and certainly not routine duties. The Appellant was not written up at all versus the four (4) write ups in Claiborne. The Appellant did not have routine responsibilities whereas

Claiborne did. Finally, the Appellant was not warned and Claiborne was. Therefore, there are no similarities to the case sub judice and Claiborne.

The Appellant fails to understand what substantiated testimony and/or evidence led the Agency Appellee to conclude that the Appellant did not take the appropriate interest in her job to protect it. Nothing in the record supports this subjectively judgmental leap. The Appellant did her best. She went to work early, left late, and worked weekends to complete assignments properly and on time. The Employer verified this statement. (tr. 136 - 140) When all facts are taken together, the Appellant could do nothing more to protect her job even if she had known it was in jeopardy.

There was nothing which should have prevented the Employer Appellee from informing the Appellant of alleged problems and solutions to those problems. They worked in the same office. This office had various means of communication and the Employer Appellee maintained control over the work environment as well as the Appellant's work. Yet, The Employer did not warn, reprimand, document, or investigate. He did nothing which would have put the Appellant on notice that something was not just wrong, but something was terribly wrong and her job was in jeopardy. Tr. 23. This is a curious thing and it lacks reason unless other factors are considered. Those other factors are dollars. The employer was losing money and these other allegations attempt to justify the Appellant's termination. Thus, these allegations are an attempt to show that the Appellant committed misconduct when the truth is embedded in the fact that the Employer terminated the Appellant because he was losing money. Tr. 18, 22. This fact does not make the Appellant a poor employment risk, she simply didn't meet his expectations which is why he wouldn't hesitate to provide a "favorable recommendation"

for the Appellant to potential employees. Tr. 48.

CONCLUSION

It is very telling that the Employer took the time to write two (2) letters to the Appellant. Neither letter referenced insubordination, specific examples of failure to perform up to the employer's standards, a pattern of errors or refusal to comply with instructions, willful or wanton disregard for the employer's interest, or prolonged and persistent refusals to perform routine or any other duties. The letter of October 12, 2005 did not indicate that the Appellant's position was in jeopardy or that the Employer Appellee was receiving complaints concerning the Appellant. The letter of November 30, 2005 indicates that the Employer was "happy to have had the opportunity to get to know you and work with you." (tr. 75) It goes on to say "we are losing money by [my] continued relationship with the firm....." and that the Appellant was being terminated "for failure to meet the expectations as a practicing attorney in this office." These statements do not suggest that the Employer Appellee considered the Appellant's efforts in the same light as the Agency Appellee or that her efforts demonstrated a willful and wanton disregard for the Employer's interest. Again, the Agency Appellee has mischaracterized irrelevant facts and utilized isolated incidents and uncorroborated allegations in an attempt to prove misconduct.

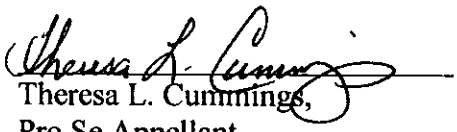
The Board of Review and Claims Examiner used the wrong standard in application to the facts of this case. They found that the Appellant failed to meet the Employer's expectations and this fact alone constituted misconduct. However, the Appellant's failure to meet the Employer's expectations are not equivalent to misconduct as defined by Wheeler.

The Circuit Court failed to properly review the facts of this case in ruling that misconduct was found. The Circuit Court did not rule that substantial evidence existed to support a claim for misconduct. The Circuit Court did not find that the Board of Review and Claims Examiner applied the correct law when determining if the Appellant committed misconduct. The court failed to determine if the Board of Review's decision was absent fraud. The Circuit Court failed to determine if the Appellant, as a matter of law, committed misconduct and thereby failed in its judicial duty.

The Employment Contract provided grounds for termination between the parties. The State of Mississippi is an at-will state and provides employers with the authority to terminate employees for cause or no cause; it is within the employer's discretion as long as employees are not terminated for discriminatory purposes. However, neither of these standards are the same as the standards required for misconduct and defined by this Honorable Court in its Wheeler decision.

Appellant timely filed her appeal on July 26, 2006 and the Appellees have, individually and collectively, failed to produce sufficient evidence against the Appellant which proves and constitutes misconduct as defined by Wheeler. Therefore, the Appellant renews her appeal to this Honorable Court. The Appellant seeks reversal of the Choctaw County Circuit Court Judge's decision whereby that court upheld the ruling of the Board of Review, repayment to the Appellant of unemployment benefits totaling $3,150.00, interests paid on the alleged overpayment, and all court costs.

Respectfully Submitted,



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This the 8th day of August, 2007.