

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 BRIEF

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REBUTTAL TO EMPLOYER DEFENDANT'S BRIEF

The Employer Defendant has routinely mischaracterized the evidence, this case, and the Claimant's brief. Further, the Employer Defendant's brief is vastly void of facts, law, and evidence which support its argument. Therefore, the Claimant takes exception to statements which suggest she was justifiably terminated for misconduct, that she discussed with the Employer Defendant unsatisfactory job performance (especially asking others to do her work), that she does not have grounds to appeal the Mississippi Department of Employment Security's Board of Review's decision, that she failed to appeal the Board of Review's decision, that she failed to appeal the Mississippi Department of Employment Security's Board of Review's decision in a timely manner, and that she filed her appeal in the wrong court.

The Employer Defendant states that the Claimant was justifiably terminated because she was costing the company money, but there is no evidence which supports this statement or legal standard of misconduct as promulgated in Wheeler. The Employer Defendant never warned the claimant that her job was in jeopardy, failed to investigate complaints, and has routinely changed the reasoning behind the Claimant's dismissal. Significantly, the Employer Defendant has not provided any evidence which supports allegations that Claimant asked others to do her work, failed to complete assignments, and failed to complete assignments on time or otherwise.

The Claimant's brief does not indicate that the Claimant admitted her termination was justified and certainly not justified due to misconduct. The Claimant specified information the employer provided to the Claims Examiner to show that the employer continues to vacillate when explaining why the Claimant was discharged. Please note

that the Employer Defendant says in its latest brief that the “[E]mployer was required to take action and terminate Employee due to her continued lack of performance.” Oddly, the employer stated that the Claimant was not in danger of losing her position when she submitted her resignation letter or in October but was suddenly discharged without warning on November 30, 2005.

While the Employer Defendant was well within its authority to hire and fire the Claimant, the Employer Defendant is in a poor position to determine how long the Claimant should receive unemployment benefits or even if the Claimant should receive such benefits. Therefore, they mischaracterize what this case is really about and fail to accept that the Claimant would not have applied for unemployment benefits at all if she had been permitted to complete her tenure as prescribed by her letter of resignation and acknowledged by the Employer Defendant. The Employer Defendant chose to unceremoniously terminate the Claimant without sufficient evidence to support misconduct.

The Claimant does not justify decisions of the Claims Examiner, Board of Review, or Choctaw County Circuit Court Judge. There is insufficient evidence to support the Claims Examiner’s and Board of Review’s findings of misconduct. Additionally, the Choctaw County Circuit Court Judge lacked substantial evidence to uphold the decision of the Board of Review, erred procedurally when dismissing the case and erred further when ruling on the merits after dismissing the case.

The Claimant did not know that she was obligated to respond to the Employer Defendant’s Motion to Dismiss especially since the Circuit Court failed to acknowledge the motion. Still, the Claimant’s failure to respond to the Defendant Employer’s motion

to dismiss does not preclude the Claimant from responding to subsequent motions by either the Employer Defendant or Agency Defendant. Claimant asserts that she certainly should have been permitted to respond to the Agency Defendant's dispositive motion so as to prevent dismissal of the case. The Choctaw County Circuit Court's ruling is as though the court met with the Department of Employment Security and denied the Claimant an opportunity to speak thereby denying her due process. The Claimant should have been permitted to speak, as is her legal right, and was denied this right by the Circuit Court's unceremonious ruling to dismiss the case.

Claimant agrees that the Circuit Court should be bound by the Board of Review's decisions if those decisions are absent of fraud and substantial evidence exists. However, there is insubstantial evidence to uphold the Board of Review's erroneous finding of misconduct. Therefore, the Choctaw County Circuit Court had a duty to overturn the Board of Review's decision.

Claimant's "living in Texas" does not make her a non-resident of Mississippi or Choctaw County. Regardless, this is the first time the Employer Defendant raises the issue of the Claimant's residency and it is too late to do so. The Employer Defendant should have presented this issue at the time of their Motion to Dismiss; it is now moot.

Is the Employer Defendant now attacking the form of the Claimant's appeal? If so, this is the first time and it is untimely as well. Claimant's failure to file the civil cover sheet and original decision of the Board of Review by July 27, 2006 does not prevent her from curing this defect and filing these documents does not perfect the appeal. Filing the notice of appeal perfects the appeal. Further, is the Employer Defendant now saying it was not notified that the Claimant was appealing the Board of Review's decision? It is

obvious by the Employer Defendant's response (Motion to Dismiss) that they knew the Claimant was appealing the decision of the Board of Review. The Employer Defendant is not simply wrong; it is untimely in raising these issues. Thus, these issues are moot.

The Claimant stands by her brief concerning the Motion for Extension of Time and Notice of Appeal. Requesting time to secure an attorney does not preclude the Claimant from being an attorney, filing the appeal or representing herself at any stage of these proceedings. Thus, this argument is without merit.

There is little, if any, evidence to support findings of misconduct against the Claimant. The Employer Defendant's kitchen sink approach, in replying to the Claimant's brief, does not alter the simple fact that the Claimant did not commit misconduct. Stating that "there is ample evidence in the record to support the Circuit Court's dismissal of Employee's appeal as untimely, as well as the Court's additional conclusion that even if the appeal had been timely it would still have been denied on the merits" does not prove that these statements or the Choctaw County Circuit Court are correct. Ample evidence does not exist to support misconduct and the Employer Defendant does not provide support for the finding of misconduct.

CONCLUSION


The crux of this case is about misconduct and the Employer Defendant has not proven misconduct either now or in previous administrative hearings or with this Court. The Claimant takes offense to the Employer's characterization that her appeal "border[s] on the frivolous" especially when this matter is "over less than two months' worth of benefits." The Employer Defendant's appeal of the Administrative Appeals Officer's decision shows that this case is apparently worth the time it takes them to appeal. This

case is about blatant lies which the Employer Defendant has promulgated since the Claimant filed for benefits --- beginning with the statement that the "Claimant quit." It continued with "we changed the effective date of the Claimant's resignation, she didn't do her job the entire time she was here, and she asked others to do her work." It continues with the Employer Defendant's reply brief.

The Claimant agrees that the Circuit Court is bound by the Mississippi Department of Employment Security's Board of Review's decision "absent fraud or lack of substantial evidence." The Claimant explicitly states that the Mississippi Department of Employment Security's Board of Review, Claims Examiner, and Choctaw County Circuit Court Judge were without sufficient evidence to support findings that the Claimant committed misconduct. The Claimant recognizes that the Employer Defendant has the authority to hire and fire at will, but it does not have the authority to dictate whether or not an employee is eligible for unemployment benefits and has not proven that the Claimant was justifiably denied unemployment benefits through a finding of misconduct.

The Claimant respectfully renews her requests to this Honorable Court and seeks reversal of the Choctaw County Circuit Court Judge's decision whereby he upheld the ruling of the Board of Review, repayment to the claimant 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 24th day of May, 2007.

CERTIFICATE OF SERVICE

I, Theresa L. Cummings, pro se appellant, do hereby certify that I have this day mailed by U.S. mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:


Mississippi Supreme Court Clerk
Honorable Betty Sephton
P.O. Box 249
Jackson, MS 39205

Mississippi Department of Employment Security
Honorable LeAnne F. Brady
P.O. Box 1699
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Choctaw County Circuit Court Judge
Honorable Joseph Loper
P.O. Box 34
Ackerman, MS 39735

This the 24th day of May, 2007.



Theresa L. Cummings,
Pro Se Appellant