

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

CASE NO. 2007-CC-00200

PATRICIA AUSTIN

PLAINTIFF/APPELLANT

VS.

**MISSISSIPPI EMPLOYMENT
SECURITY COMMISSION and
FITZGERALD CASINO**

DEFENDANT/APPELLEES

**BRIEF OF APPELLEE
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
(f/k/a MISSISSIPPI EMPLOYMENT SECURITY COMMISSION)**

**APPEAL FROM THE TUNICA COUNTY CIRCUIT COURT
OF THE STATE OF MISSISSIPPI
THE ELEVENTH JUDICIAL DISTRICT
CASE NO. 2006-0215**

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations 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 (f/k/a Mississippi Employment Security Commission) "MDES", Defendant-Appellee
2. Patricia Austin, Petitioner-Appellant Pro Se
3. Fitzgerald Casino, Defendant-Appellee
4. Melinda Drisdale, Representative for Fitzgerald Casino
5. Roger W. Sims, PPS Legal Advocate for Appellant
6. Honorable Albert B. Smith, III, Circuit Judge of the 11th Judicial District

This the 31st day of July, 2007.

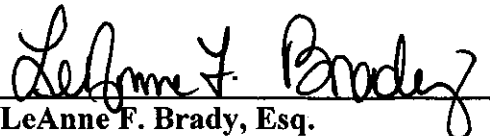

LeAnne F. Brady, Esq.

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**MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY
and FITZGERALD CASINO**

DEFENDANTS-APPELLEES

STATEMENT OF THE ISSUE

Whether the Administrative Appeals Officer, affirmed by the Board of Review, correctly decided that there is substantial evidence to prove that Patricia Austin, committed disqualifying misconduct pursuant to Miss. Code Ann. Section 71-5-513 (A) (1)(b)(Supp. 2005).

STATEMENT OF THE CASE

Patricia Austin [also hereafter referred to as "Claimant"] was employed with Fitzgerald Casino [also hereafter referred to as "Employer"] as a security officer until her separation on June 13, 2006. (R. Vol. 2 p. 14). The Claimant was terminated by her Employer for misconduct, specifically for leaving her post unattended. (R. Vol. 2 p. 15).

On June 14, 2006, Ms. Austin filed for unemployment benefits. (R. Vol. 2 p. 1). The Claims Examiner investigated the facts and circumstances surrounding this case, and found that the Claimant was disqualified from receiving unemployment benefits because she was terminated by her employer for misconduct. (R. Vol. 2 p. 4). Subsequently, the Claimant appealed the decision of the Claims Examiner and a hearing before the Administrative Appeals Officer¹ [hereafter also referred to as "AAO"] was held on August 7, 2006, at which the Claimant and an Employer Representative testified. (R. Vol. 2 p. 6-39). Based upon the

testimony presented at the hearing, the Administrative Appeals Officer found the Claimant was disqualified from receiving unemployment benefits for misconduct connected with her work under Miss. Code Ann. Section 71-5-513A (1)(b). (R. Vol. 2 p. 32-34). The AAO's Findings of Fact and Opinion are as follows:

FINDINGS OF FACT:

Claimant was employed for two years as a security officer with Fitzgerald Casino, Robinsonville, Mississippi, ending June 13, 2006. Claimant was discharged for two violations of employer policy regarding being away from her duty post. On June 07, 2006, claimant left her duty post on two separate occasions to go to the restroom. Company policy states that anytime security officers leave their post, they must radio another security officer to man their post until they return. Claimant admitted she did not radio another security officer to take her position on either occasion. Claimant received a written warning on November 11, 2005, for abandoning her post without notifying a replacement on three separate occasions on November 11, 2005. Company surveillance captured claimant inside the employer gift shop three times that day. After an employer investigation of this incident, claimant was issued a final warning on November 17, 2005, for issuing a false statement about being in the gift shop on November 11, 2005. This warning stated that any further violations would lead to disciplinary action up to and including termination. Company policy was conveyed by an employee handbook which claimant received at orientation.

OPINION:

Section 71-5-513A(1) (b) of the law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he has earned remuneration for personal services equal to not less than eight times his weekly benefit amount as determined in each case. In the Mississippi Supreme Court, in the case of *Wheeler v. Arriola*, 408 So. 2d 1381 (1982), the Court held that:

"The meaning of the term 'misconduct', as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's

¹ MDES has formally changed the name of the Administrative Appeals Officers to "Administrative Law Judge," or "ALJ." However, at the time of this hearing, the ALJ's were still referred to as "Administrative Appeals Officers," or "AAO's."

duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertencies and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute."

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. (MESC Administrative Manual Part V, paragraph 1720).

It is the opinion of the Administrative Appeals Officer that claimant was discharged for violations of known employer policy regarding leaving her duty post without notifying another employee to replace her at her post. Claimant did this five different times on two separate days. Claimant was issued written warnings for each violation and then received a final warning for making a false statement to the employer during an investigation of one of the violations. Claimant's actions rose to the level of misconduct connected with the work as that term is used in the Law. The decision of the Claims Examiner will be modified as to the beginning date of disqualification only.

The Claimant appealed to the Board of Review which adopted the Findings of Fact and Opinion of the AAO. (R. Vol. 2 p. 50). Aggrieved, Ms. Austin appealed to the Circuit Court of Tunica County and the Honorable Albert B. Smith, III., affirmed the decision of the Board of Review. (R. Vol. 1 p. 8, 49-50). The Claimant then perfected her appeal to this Honorable Court. (R. Vol. 2 p. 62-63).

SUMMMARY OF THE ARGUMENT

The applicable statute in this case, Mississippi Code Annotated Section 71-5-513 (A)(1)(b) provides for disqualifying persons from benefits otherwise eligible if they have committed acts of misconduct on the job.

In the present case, substantial evidence was presenting in the record proving Ms. Austin was discharged for misconduct. Prior to her termination, Ms. Austin received a written warning for leaving her post unattended. (R. Vol. 2 p. 17). She then received another written warning for

being dishonest about leaving her post. (R. Vol 2 p. 18). This pattern of behavior ultimately ended in her termination when she left her post unattended twice in one shift. (R. Vol 2. p. 15).

Therefore, it is the Appellee's contention that the testimony and evidence, taken as a whole, before the Administrative Appeals Officer was sufficient and substantial and did show that the Claimant's actions constitute misconduct. Thus, the Claimant is disqualified from receiving benefits under the Mississippi Employment Security Act and this Honorable Court should affirm the decision of the Board of Review.

ARGUMENT

Ms. Austin'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).

Mississippi Code Annotated Section 71-5-513 provides for disqualifying persons from benefits otherwise eligible for acts of misconduct connected with their work. The term misconduct as used in the Mississippi Employment Security Law is usually defined as an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standard of behavior which an employer has the right to expect from an employee, or carelessness and negligence indicating an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982).

In Mississippi Employment Security Commission vs. Percy, 641 So. 2d 1172 (Miss. 1994), the Supreme Court stated that when analyzing misconduct, not only the violation in question should be assessed, but all actions or inactions expected of the employee that affect the reasonable interest of the employer. After discussing the purpose of the employer's policy, the Court then held that the failure of Ms. Percy, a nurse, to follow the hospital's time keeping procedure constituted misconduct. Id. at 1176, Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982). Additionally, a repeated neglect of the Employer's interest may show a pattern of misconduct on the part of the claimant. Mississippi Employment Security Commission vs. Jones, 755 So. 2d 1259 (Miss. 2000).

In the case *sub judice*, the Claimant's behavior clearly exhibits a wanton or willful disregard for the employer's interests. The Employer representative, Ms. Melinda Drisdale,

testified that the claimant was terminated for leaving her post unattended. (R. Vol. 2 p. 15). Ms. Drisdale testified that it was necessary for Ms. Austin to remain at her post at all times to stop unattended minors from entering the casino. (R. Vol. 2 p. 15). Ms. Drisdale testified that the proper procedure for taking breaks was for Ms. Austin to radio for someone to come and relieve her. (R. Vol. 2 p. 16). Ms. Drisdale testified that Ms. Austin failed to follow this policy twice in one shift. (R. Vol. 2 p. 15). She further testified that Ms. Austin was aware of this policy through employee orientation and that she had received a prior written warning for leaving her post and looking in the gift shop. (R. Vol. 2 p. 16).

Furthermore, Ms. Austin admitted that she left her post to go to the bathroom twice on the day she was terminated (R. Vol. 2 p. 33). She claimed her radio did not work, but admitted that she did not even attempt to use her radio to try and contact someone to come and relieve her. (R. Vol. 2 p. 33-34). Ms. Austin also admitted that she knew the company's policy regarding breaks and she also admitted to going into the gift shop when she received the previous written warning. (R. Vol. 2 p. 35).

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. The Appellant's own admissions in the hearing show that she did not follow proper procedure and violated the Employer's policy. Furthermore, one of the Appellant's primary responsibilities was ensuring that minors did not enter the casino. The Employer's policy regarding breaks was put in place to protect the casino from violating state gambling laws. The Appellant was aware of how important her position was. Clearly, the Claimant's actions were not only willful and wanton, but they also demonstrated a negligent pattern of behavior towards the Employer's interests. Thus, applying

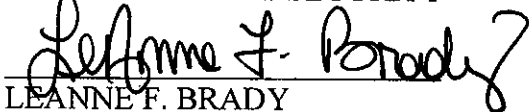
Wheeler, Percy, and Jones, this Honorable Court should affirm the decision of the Board of Review.

CONCLUSION

There is substantial evidence to support the findings of fact and the opinion of the Board that the Claimant did commit acts of misconduct, and should be, and in fact, is disqualified under the Mississippi Employment Security Law. Thus, this Honorable Court should affirm the decision of the Board of Review in this matter.

Respectfully submitted this the 31st day of July, 2007.

MISSISSIPPI DEPARTMENT
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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:

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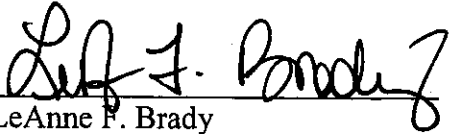
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This the 31st day of July, 2007.

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