

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

CASE NO. 2007-CC-00200

PATRICIA AUSTIN

PLAINTIFF/APPELLANT

VS.

**MISSISSIPPI EMPLOYMENT
SECURITY COMMISSION and
FITZGERALD CASINO**

DEFENDANTS/APPELLEES

BRIEF OF APPELLANT

**APPEAL FROM THE TUNICA COUNTY CIRCUIT COURT
OF THE STATE OF MISSISSIPPI
THE ELEVENTH JUDICIAL DISTRICT
CASE NO. 200-0215**

ORAL ARGUMENT NOT REQUESTED

**PATRICIA AUSTIN, PRO SE
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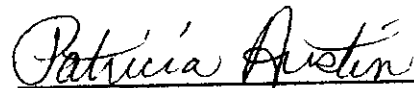
DEFENDANTS/APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned Pro se Appellant 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. Patricia Austin, Petitioner-Appellant Pro se
2. Mississippi Employment Security Commission (MESC), Defendant-Appellee
3. Hon. Leanne F. Brady, Bar #100793, Senior Attorney for MESC
4. Fitzgerald Casino, Defendant-Appellee
5. Mrs. Melinda Drisdale, Representative for Fitzgerald Casino
6. Roger W. Sims, PPS Legal Advocate for Appellant
7. Mr. Mike Morgan, MESC Administrative Hearing Officer (AAO)
8. Honorable Albert B. Smith III, Deciding Circuit Judge of 11th Judicial District
9. PPS Legal Research Clinic, P. A..

This, the 27th day of June, 2007.



Patricia Austin, Appellant Pro se

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STATEMENT OF THE ISSUE(S)

Appellant Austin presents as her statement of the issue for the Court's review -of the following contention:

ISSUE ONE:

Whether the Board of Review Decision Should be vacated finding the Employee, Patricia Austin, proved by substantial evidence that she did not commit misconduct connected with her work, that is conduct evincing such wilful and wanton disregard of standards of behavior which employer has the right to expect from his employee, or carelessness and Negligence in such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design.

ISSUE TWO:

Where there is substantial evidence to support the agency finding that Fitzgerald Casino met its burden of proof by presenting Hearsay Evidence that Austin committed disqualifying misconduct, and whether the Circuit Judge erred by not addressing Austin's claim of Hearsay Evidence by Fitzgerald Casino's failure to present affidavits of persons accusing Austin of Misconduct.

STATEMENT OF THE CASE

Your Appellant, Patricia August, had been an employee with Fitzgerald Casino for a period of over two (2) years. R-1 & 14. Appellant Austin was hired as a Security Officer. R-15 She did not quit her job nor was she laid off. Her last work day was June 08, 2006, and she was discharged/terminated effective on or about June 12, 2006 or on about June 13, 2006. R-1, R-14

The record indicates that after Appellant Austin was fired or terminated, she filed an initial claim for benefits effective June 18, 2006. R-14 On June 26, 2006, the Claim Examiner arbitrarily and capriciously disqualified Appellant Austin from receipt of benefits on the grounds she was discharged for misconduct connected with the work. Ms. Austin filed her appeal from that decision on July 07, 2006. R-14 (one part of the record indicates that the claimant appeal decision was rendered on June 23, 2006. See R-5).

The testimony that was given against Appellant Austin was by Ms. Melinda Drisdale, a representative for the employer, Fitzgerald Casino. R-11 Neither one of Ms. Austin's accusers was present at the hearing so that she could cross-examine them concerning the reason why she was determined. Ms. Melinda Drisdale could only give hearsay testimony. R-24

Ms. Drisdale stated that Appellant Austin was on post, post like a podium that connects, that go between the hotel and the casino. A Security have to be there to keep any minors from entering the Casino without an of age guest with them. Ms. Drisdale testified that she was on that post and she (Officer Austin) left the post twice unattended to go to the restroom on the same shift. R-15. Ms. Drisdale also testified that Appellant Austin was gone 10 to 15 seconds on each trip to the bathroom. R-16

Ms. Drisdale based most of her testimony on what allegedly seen on the Security Camera but did not provide a copy of the video for the hearing nor did she add a copy to the record for the court to review on its own. R-031

Ms. Drisdale stated that Appellant Austin's job was to be on post, which is like a podium that connects between the Fitzgerald hotel and the Fitzgerald casino, and they need a Security Officer there on post to keep any minors from entering the Casino without an of age guest with them. Ms. Drisdale, did not witness the incident, but stated that Austin left the post unattended to go to the restroom twice. That she was gone on 10 to 15 seconds on each of these trips. R 15-16.

Ms. Drisdale stated that the proper procedure for her to be able to go to the restrooms, is to call on the radio for someone to relieve her when she left. that is, to get in touch with another Security Officer or Security Supervisor to relieve her. These incidents occurred on June 07, 2006. R 15-16 Austin was terminated for these incident occurred on June 07, 2006.

Ms. Drisdale testified concerning a prior incident that occurred on November 11, 2005, and stated that the surveillance detail indicated she had left her post and was standing in the gift shop looking at the display cases as if she was shopping. Ms. Austin was able to see her post from the gift shop. That on the same date, she was in there three separate times, the first time for approximately one minute, the second time approximately two and a half minute and the third time approximately 45 seconds. R-17

Ms. Austin denied that she was in the gift shop looking as display cases as if she was shopping, and she was allegedly given a final written warning for her dishonestly regarding her conduct in the gift shop. R 17-18 Ms. Drisdale did not do the written warning and she did

not present the video clips as evidence of her alleged testimony, therefore she did not have any proof to often in order to prove her claim other than by uncorroborated hearsay testimony and/or unsubstantial evidence.

Statement of the Facts

The Claimant-Appellant Patricia Austin had been an employee with the Fitzgerald Casino for a period of two (2) years. R-1, R- 4 Her job was a Security Officer assigned to a Post, which is like a podium that connects between the Fitzgerald hotel and the Fitzgerald casino, and they need a Security Officer there on post to keep any minors from entering the Casino without an of age guest with them. R-15 She has always been an excellent employee meaning, a nice personality in greeting people and welcoming the guests to the casino, rendering a spirit of Mississippi Hospitality and making sure that everyone was safe. Therefore, her job went beyond that of just being a Security Officer at the Post. R-23

No other complaints have ever been lodged against her as to add up as being misconduct connected with her work, one that you can say a conduct evincing such willful and wanton disregard of the employer's interest as to amount to a deliberate violation or disregard of standards of behavior which the employer has the right to expect from his employee. She was never careless or negligence in such degree, or recurrence thereof, as to manifest **culpability, wrongful intent or evil design** against the employer. In other words, she was honest and trustworthy and never caused any harm or damage to the employer.

The record shows that on the date of question, Ms. Austin left her post to use the bathroom twice, and on each trip, she was gone only 10 to 15 seconds. The rule is that she

R-16 The Employer does not provide a relief person for that purpose, that is, an urgent need to or have some there when you have to leave the post to use the bathroom. Usually, she would have to radio another Security officer or a Security Supervisor. R-16, R-27

Ms. Austin said that she had to go and use the bathroom right quick because the medications that she was on had her going. R-33 She also stated that lot of times their radios are mess up, and they have bad radios. And, by time someone would get there, she would have mess up herself, so she quickly ran in and out every time, when she had to go. R 33-34 The bathroom had to be close by because it only took her 10 to 15 seconds each time she went. Ms. Austin stated that she had a bad radio on that day, and she just ran into the bathroom and out. R-34

The record also indicates that Ms. Austin was in fact on medication that day. Ms.

Drisdale stated that she did not know that she was on medication until after the incident. Ms. Austin sent a copy of the Doctor's statement to the Employer and added one into the record, stating that Ms. Austin was on medication and that it increase her going to the bathroom or it would cause her frequency to go to the bathroom. R-27

Ms. Austin stated that the gift shop, the hallway and the bathroom all in her area where she is posted, that is, it's her job to see what is going on in her area. She testified that concerning the warning she received on November 11, 2005, the incident of her being in the gift shop, that she walked over to the gift shop door and talked to one of the guest that was a high roller and a supervisor. And, that each time she went to the gift shop door, she was still watching her area. R-35.

Ms. Austin denied that she was actually inside the gift shop on that date and she just went to the gift shop entrance, that is, right there in the door. R-35 Ms. Drisdale did not present a video tape to prove her claim against Ms. Austin. Therefore, we never knew whether she testified truthfully. Ms. Austin was actually written up on all times by her supervisor, Willie Jackson, who also signed the warning and the final written warning that caused her to be discharged from her employment. R 27-28

However, the final written warning was issued on June 7, 2006, that Ms. Austin had in her possession was not signed. R-28 Then Ms. Drisdale testified, which was contrary to her original testimony that her suspension was signed by Mr. Terry Williams. Neither Mr. Jackson nor Mr. Terry Williams made themselves available as to be witnesses against Ms. Austin, and so that she could be able to cross examine them.

Ms. Drisdale also testified as following:

"The copy that you have is a duplicate copy, we have a four part carbon copy and sometimes the signatures don't always go through. But there is a signature here on file and the original copy. (No copy of the alleged original previous write-ups were furnished Ms. Austin by the appellees for her to examine for fraud or for cross examination of the uncorroborated hearsay testimony of Ms. Drisdale)

Q. Ma'ma it supposedly, we're suppose to have a copy just like yours. You could have Signed it or got somebody to sign it a couple of days later.

A. It's a four part color copy that we give to team members. It doesn't always go through. The signature doesn't always go through. There is a signature on file here. But that's a new point as to who suspended her. She was suspended, we

all agree to that because she's been terminated. " R-28

Ms. Drisdale was asked, "Did anybody other than the camera, anybody else see Ms.

Austin leaving her post (the last incident). " Ms. Drisdale stated, yes, there was someone who

walked up and found the post empty, Mr. Sammie Lofton, he's a Security Officer. Ms. Drisdale

was not sure if he's a supervisor or not. And, that he was a witness to the issuance of the

counseling. Again, Ms. Drisdale did not put forth the effort to have this witness, Sammie Lofton

available for the hearing, so that Ms. Austin could cross examine him.

Again, Ms. Drisdale gave conflicting testimony in regarding to the final write up. She

was asked as following:

Q: Would you say that abandon the area was leaving, abandon the area meaning that

she abandon completely with no to return back, or that she left not to return back?

A: No, sir, I did not say that. R-31

Ms. Drisdale could not state the Rule number that Ms. Austin had violated or what she

was exactly written up under. However, the only rule that she could be given a writeup for was

Rule 22, which states.

"The company has the right to insist upon high standards of performance from all

team members and to require that you inherited to a high degree of personal and personal

accountability. If these expectations are not meet (sic), we reserved the right to apply

discipline up to and including termination of employment, this include but not limited to:

lottery or leaving the place of work during work hours without permission. Job

abandonment, being in an a other those designated to perform user duty to break area."

R-32

The question was asked Mrs. Drisdale, "Would you say that she was written up for job abandonment?"

A: No, Sir. If she was written up for job abandonment she would be written up for job abandonment, not misconduct. R-32

Since the record shows that the prior writeups as well as the final writeup were written by Mr. Willie Jackson and witnessed by Mr. Timothy Airwood, and the one written on November 17, 2005 was witnessed by Ms McCoy. The file seems to inadequate or alter and some that are in Ms. Austin's possession were not signed, and neither of those witnesses were available to give testimony concerning the incidents or the writeups. Without those witnesses the employer has not prove its case other than by uncorroborated hearsay testimony given by Ms. Drisdale based on the Security Camera clips, which was not provided to be reviewed by Ms. Austin at the hearing, nor was the clips provided for the court to review in order to make it ruling. R- 035, 036

The fact is that the burden of proof falls on the employer to prove their case of misconduct against Ms. Austin and that case cannot be proven without the actual witnesses' statement or testimony. There is a fact that Ms. Austin did not walk away from job, but was fired and terminated by the employer. She committed no harm to the employer to consider that she has committed a serious conduct in order to deny her unemployment compensation

SUMMARY OF THE ARGUMENT

There was no evidence or source of proof presented that Appellant Austin committed misconduct with the unemployment compensation statute, indicating that Ms. Austin's conduct evincing such willful and wanton disregard of the employer's interest such as deliberate

violation or disregard of standards of behavior in such degree, or recurrence thereof, as to manifest culpability wrongful intent to evil design. Wheeler v. Arriola, 408 so.2d 1381 (Miss. 1982).

The Mississippi Employment Security Commission Review Board and the Referee made their decision to deny Patricia Austin Unemployment benefit because of misconduct mainly on uncorroborated hearsay testimony. The actual witnesses which were her accusers did not make themselves available to even give a oral or written statement or to be cross examine by Ms. Austin.

“The meaning of the term ‘misconduct’, as used in the unemployment compensation statute, was misconduct evincing such willful and wanton

The Mississippi Supreme Court, in the case of Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982), the Court held that:

See Miss. Employment Sec. Com’n v. Danner, 867 So.2d 1050 (Miss.App. 2004).

“This Court’s standard of review of an administrative Agency’s findings and conclusions must remain undisturbed unless the agency’s order (1) is not supported by substantial evidence, (2) is arbitrary or capricious (3) is beyond the scope or power granted to the agency, (4) violates ones constitutional rights. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise. Lastly, this Court must not reweigh the facts of the case or insert its judgment for that of the agency.”

Mississippi Employment Security Commission, 639 So.2d 904, 906 (Miss. 1994):

531 (Rev. 2002). The Mississippi Supreme Court explained this standard of review in Allen v. jurisdiction of said court shall be confined to question of law.” Miss. Code Ann. Section 71-5- the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the “In any judicial proceeding under this section, the findings of the board of review as to

Standard of Review

WHETHER THE BOARD OF REVIEW DECISION SHOULD BE VACATED FINDING THE EMPLOYEE, PATRICIA AUSTIN, PROVED BY SUBSTANTIAL EVIDENCE THAT SHE DID NOT COMMIT MISCONDUCT CONNECTED WITH HER WORK, THAT IS CONDUCT EVINCING SUCH WILLFUL AND WANTON DISREGARD OF STANDARDS OF BEHAVIOR WHICH EMPLOYER HAS THE RIGHT TO EXPECT FROM HIS EMPLOYEE, OR CARELESSNESS AND NEGLIGENCE IN SUCH DEGREE, OR RECURRENCE THEREOF, AS TO MANIFEST CULPABILITY, WRONGFUL INTENT OR EVIL DESIGN.

ISSUE ONE:

ARGUMENT

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 duties and obligations to his employer, came within the term.... [Emphasis added]

LAW AND ANALYSIS

Unemployment benefits are available for employees who leave work involuntarily, through no fault of their own. *Mills v. Miss. Employment Sec. Comm'n*, 228 Miss. 789, 797, 89 So.2d 727, 729 (1956) (quoting *Dwyer v. Appeal Bd. of Mich. Unemployment Comp. Comm'n*, 321 Mich. 178, 188, 32 N.W.2d 434, 437 Page 1068 (1948)). An employee is disqualified from receiving unemployment benefits if the person left the job voluntarily without good cause. *Miss. Code Ann. § 71-5-513 (A)(1)(a)* (Supp. 2003). The employee has the burden of proving that he left the job for good cause. *Miss. Code Ann. § 71-5-513 (A)(1)(c)* (Supp. 2003). ¶ 9. Our review of the MES's denial of unemployment benefits is limited to questions of law as provided in Mississippi Code Annotated section 71-5-531 (Rev. 2000). "The Board's findings of fact are conclusive if supported by substantial evidence and without fraud." *Hoerner Boxes, Inc. v. Miss. Employment Sec. Comm'n*, 693 So.2d 1343, 1347 (Miss. 1997). The Board's finding that an employee has quit work voluntarily without good cause is a question of fact that will be affirmed if supported by substantial evidence. *Huckabee v. Miss. Employment Sec. Comm'n*, 735 So.2d 390, 394 (Miss. 1999).

In the case sub judice, the Appellant filed a claim for benefits under the Mississippi

employment Security Law and the claims examiner disallowed same, holding that the employee Patricia Austin was discharged because of misconduct. This court should reverse finding that there was no evidence, under the law, to support appellant's discharge for misconduct connected with her work.

Before the court affirmed the MESA Board of Review decision, the court must find that Appellant Austin violated the Employer' Rule by committing misconduct. The Court must find that the evidence the Defendant-Appellee presented must prove the following:

- a. That Appellant Austin committed conduct evincing willful and wanton disregard of her employer's interest;
- b. That such conduct was such as deliberate violation or disregard of standards of behavior which her employer has the right to expect from his employee
- c. That the said conduct of Appellant Austin was so carelessness and negligence in such degree or recurrence thereof, as to manifest culpability, wrongful intent or evil design to damage, degrade or destroy the employee's busy.

No evidence was presented in the record as to discharge a trustful, caring hard worker such as one who had an excellent record and more than two years of experience with no allocations or confusion between her superior officers or fellow-employees. There were no recurrence of any intentional misconduct as to be wrongful intent or evil design to damage, degrade or destroy the employee's busy. Most of all she was honest and secured the interests of the employee as the best she new how or as the best to her ability.

Appellant was very careful not to get carelessness and mess up her job on her post, that she was responsible for protecting the customers and securing her posted area.

Austin was not denied benefits because she was found to have been discharged for

insubordination, a form of misconduct. Actions that constitute "misconduct" are a proper basis for denying unemployment benefits. Miss. Code Ann. § 71-5-513(A)(1)(b) (Supp. 2005); Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982). Once a former employee has filed for benefits, the evidentiary burden is on the former employer to show by "substantial, clear, and

convincing evidence" that the claimant is disqualified from receiving benefits. Pannell v. Tombigbee River Valley Water Mgmt. Dist., 909 So. 2d 1115, 1120 (Miss. 2005). The first issue we will discuss is the kind of evidence that must exist before the total evidence may be considered to be **substantial**.

The Employer Representative, Ms. Drisdale, the appellee stated that their policy states clearly that any misconduct such leaving the security post unattended automatically resulted in termination no matter whether the evidence proved that Austin left for a good and emergency reason. However, she presented no source of the said Policy nor did she quote any rules or regulation references of where such rule may be found for review, nor were there any witnesses available for the hearing so that Austin may cross examine them as to the true reason why she was written up, and with such testimony or cross examination and/or without such report, the said quote cannot amount to anything but hearsay evidence. The evidence against Ms. Austin must be clear and convincing and without the actual witnesses of the incidents and those that actual did the writeups, the evidence cannot be clear and convincing. Testimony of what was seen a security camera by the employer cannot be clear and convincing evidence without affording the appellant, the Board of Review and this Court a copy to review.

Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982), set the standards on employees being discharged from employment without having the right to unemployment benefits. Even Miss. Emp. Sec. v. McLane-Southern, Inc. explained the meaning of "misconduct" as it relates to the disqualifying employees their unemployment benefits. Both cases explained that:

"[C]onduct evidencing such willful and wanton disregard of the employer's interest as is found in deliberated violations or disregard of standards of behavior which the employer has a

(1): *Consideration of hearsay as substantial evidence*

Commission, 395 So.2d 964, 966 (Miss. 1981).
583 So. 2d 626, 628 (Miss. 1991) (citing *Williams v. Mississippi Employment Security*
the required level of substantial evidence." *Miss. Emp. Sec. Comm'n v. McLane-Southern, Inc.*,
1225, 1231 (Miss. 1998). However, "uncorroborated hearsay testimony is insufficient to rise to
hearings are not limited to strict rules of evidence. *Davis v. Pub. Emp. Ret. Sys.*, 750 So. 2d
"[A]n agency decision must be supported by substantial evidence. Administrative agency

the Court stated:

recent case, *McClinton v. Dept. of Employ Sec.*, 205-CC-01961-COA (Miss. App. 10-17-2006,

The argument shown above can only be hearsay evidence without offering proof. In a

Standard of Review

PERSONS ACCUSING AUSTIN OF MISCONDUCT.
FITZGERALD CASINO AND BY ITS FAILURE TO PRESENT AFFIDAVITS OF THOSE
NOT ADDRESSING AUSTIN'S CLAIM OF HEARSAY EVIDENCE BY PRESENTED BY
DISQUALIFYING MISCONDUCT, AND WHETHER THE CIRCUIT JUDGE ERRED BY
UNCORROBORATED HEARSAY TESTIMONY THAT AUSTIN COMMITTED
FINDING THAT FITZGERALD CASINO MET ITS BURDEN OF PROOF BY PRESENTING
WHETHER THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE AGENCY

ISSUE TWO:

her unemployment benefit.

This court must reverse the Circuit Court Judgment with instructions to grant Austin her

considered "misconduct" within the meaning of the statute."

negligence in isolated incidents, and good faith errors in judgement or discretion were not
failure in good performance as the result of inability or incapacity, or inadvertencies and ordinary
obligations to his employer, came within the term, Mere inefficiency, unsatisfactory conduct,
intentional or substantial disregard of the employer's interest or of the employee's duties and
recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an
right to expect from his employee. Also, carelessness and negligence of such degree, or

Decisions by an administrative agency receive deference. St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dept of Health, 910 So. 2d 1077, 1081 (Miss. 2005). The facts will not be re-weighed nor will the discretion of the court be substituted for the discretion of an agency. *Id.* ¶ 6. As we have already summarized, an agency decision must be supported by substantial evidence. Administrative agency hearings are not limited to strict rules of evidence. Davis v. Pub. Emp. Ret. Sys., 750 So. 2d 1225, 1231 (Miss. 1998). However, "uncorroborated hearsay testimony is insufficient to rise to the required level of substantial evidence." Miss. Emp. Sec. Comm'n v. McLane-Southern, Inc., 583 So. 2d 626, 628 (Miss. 1991).

The Mississippi Supreme Court has never cited its opinion in McLane-Southern. This Court has cited it only twice for the uncorroborated hearsay statement. The more recent use led to reversal because we found that the only evidence supporting the disqualifying conduct was such hearsay. Campbell v. Miss. Emp. Sec. Comm'n, 782 So. 2d 751, 755 (Miss. Ct.App. 2000). In an earlier decision, this Court examined somewhat closely the "uncorroborated hearsay" language; the Department refers us to that opinion as an accurate statement of the law." *Id.*

Case authorities establish that willful and wanton or grossly negligent, violations of reasonable Employer policies constitutes disqualifying misconduct. See Mississippi Security Commission vs. Percy, 641 So.2d 1172 (Miss. 1994). One of the issue of conduct is whether the Defendant employer proved by substantial evidence that Ms. Austin repeatedly violated the Employer's reasonable standards of behavior, by neglecting her assigned duties and deliberately or willfully and wantonly leaving her security post unattended may possibly cause her job or to be discharged.

Section 71-5-531 states that the appeal 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.

"Live testimony always overrides "uncorroborated hearsay in the form of testimony and through statements," *Id.* In the case sub judge the Appellee had none, except for Ms. Drisdale and she could only give uncorroborated hearsay testimony.

An employee's failure to follow his employer's policy may constitute misconduct and

disqualify him from receiving unemployment benefits. Captain v. Mississippi Employment Security Commission, 817 So.2d 634 (Miss. Ct. App. 2002). However, the employer bears the burden of proof in showing misconduct by clear and convincing evidence. Trading Post, Inc. v. Nunnery, 731 So.2d 1198, 1202 (Miss. 1999).

The employer was represented by Ms. Drisdale, who only could give hearsay testimony concerning the alleged misconduct, did give clear and convincing evidence in proving the Employer's case. She did not have any statements given her by the actual witnesses or the one that actually did the writeups. The evidence given was not clear and convincing as to prove misconduct. However, Ms. Drisdale did admit that Ms. Austin was terminated for leaving her work post unattended for 10 to 15 seconds to go to the bathroom twice, and that she was written up by her supervisor, **Willie Jackson**. Willie Jackson was the one that was involved in the situation with Ms. Austin, R-20 The hearing proceeded on uncorroborated hearsay testimony given by Ms. Drisdale as following:

Q: So the information that you have that he just related that to you, did not witness the incident or you just, he just told you what it was and you're just going by what was written on the paper.

A: I have surveillance coverage that I'm going by, R-2

The record would also show that the incident which Ms. Austin was given a writing warning for on November 11, 2005, was not misconduct. Ms. Drisdale stated, they got a statement from Ms. Austin regarding the incident and a statement from Willie Jackson, her supervisor. Neither of these statements were added to the record.

Q: Okay, her statement was not furnished to me when you fax it.

A: I didn't fax anything; I didn't fax any evidence at all.

Q: Okay, do you have a copy of that statement with you?

A: I do, but I do not wish to enter it into evidence at this point and time.

Q: Yes ma'am but this is a hearing, I need to know exactly what she said.

A: I can give you what she said; I can read it to you.

Q: Okay read it to me.

A: It said my post was one, walked over and looked at show window and talk

to some guests and asked them how they like the old fashion window case, they said they like it. And then walked over to gift shop door entrance, but I still was watching my post only for a few minutes and walked back to my post. R-23

However, Ms. Drisdale contradicted her statement by saying what she saw in the

Surveillance coverage.

Q: I don't see all that in the write up.

A: Oh we don't put all the details in the write up; we wouldn't have space for that.

Q: Most of it just hearsay is what you telling me?

A: pardon me?

Q: What you're telling me, most of it is just hearsay.

A: No sir, this surveillance coverage.

Q: That you got from somebody else, right?

A: This is surveillance coverage. This is what a camera what shows her doing.

It is clear evidence that neither one of the prior incident amount to misconduct.

The final incident in question, which Ms. Austin was discharged about, definitely is not

a misconduct.

Case authorities establish that, willful and wanton or grossly negligent, violations of

reasonable employer policies constitutes disqualifying misconduct. See Mississippi Security Commission vs. Percy, 641 So.2d 1172 (Miss. 1994). One of the issue of conduct is whether the Defendant employer proved by substantial evidence that Ms. Austin repeatedly violated the employer's reasonable standards of behavior, by neglecting her assigned duties and deliberately or willfully and wantonly to involve herself in a misconduct that may have possibly cause her to be discharged from her employment.

Section 71-5-531 states that the appeal 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. Richardson v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

Misconduct imports conduct that reasonable and fair minded external observers would consider wanton disregard of the employer's legitimate interests. Mississippi Employment Security Commission v. Phillips, 562 So.2d 115, 118 (Miss. 1990).

In the case sub judice, Appellant Austin was on medication that frequently caused her to want to use the bathroom. I was almost impossible to wait to someone relieve her of her post, therefore, she was in and out the bathroom within 15 seconds at a time. That is she returned back to her post quickly, almost as quick as if she was standing at her post and look one way and turn to look another way. The main thing is that she did not abandon her post. Ms. Austin failed to meet the requirement or meaning of "misconduct" as conduct that reasonable and fair minded external observers would consider want disregard of the employer's legitimate interests. Id.

By Ms. Austin leaving her post and returning less than twenty seconds each time really was not an evil design or misconduct that clearly consisted of evincing such willful and wanton disregard of employer's interest such as deliberate violation or disregard of standard of behavior which employer has the right to expect from his employee, or carelessness and negligence in such degree, or recurrence thereof, as to manifest culpability **wrongful intent**. Therefore, the incident was not cause enough to terminate a **fateful employee** whom has give more than two years of good service to her employer without damaging the employer in any way or in a way without having disregard of the employer's interests. This was justified by her returning to her post as quickly as possible, without abandoning it for a long period of time.

The Employer Fitzgerald Casino immediately discharged Ms. Austin for misconduct **connected** with her work and was disqualified from receiving unemployment benefits. She was left in poverty without work and without money to pay bills and to purchase gas to search for other employment.

The term "misconduct" as used in the Mississippi Employment Security Law, may be defined as an act of wanton or willful disregard of the employer's rules. Mississippi Employment Commission v. Philadelphia Municipal Separate School District of Neshoba County, 437 So.2d 388 (Miss. 1983).

Ms. Drisdale testified at the appeal hearing and said that Ms. Austin began working for Fitzgerald Casino on June 16, 2004. Her last day worked was on June 08, 2006, and here effective termination was on June 13, 2006. R-14 That Ms. Austin's job title was a Security Officer, and the cause of her separation was "misconduct, specifically leaving her post unattended.

That is "she was on post, post is like a podium that connects, that go between our hotel and our casino. Specifically, the post that she was on. "We have a Security Officer there to keep any

minors from entering the Casino without an of age guest with them. She was on that post and she left that post unattended to go to the restroom twice." That is twice on the same shift. R-15 Ms. Austin had an emergency to use the bathroom and she was only gone approximately 10 to 15

seconds on each trip. R-16 She did not abandon her post with no return. This was not hardly

misconduct as to manifest culpability, wrongful intent or evil design to damage, degrade or

destruct the employee's busy. See Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982).

upon the evidence presented, and was not enough in determining whether there is good cause to disqualify Ms. Austin for willful misconduct Miss. Code 1972, Section 71-5513(2). The

testimony was uncorroborated hearsay evidence. The writer of the incident, the supervisor over

Ms. Austin was not available for cross examination and did not present Ms. Drisdale with an

affidavit as to the incident. Ms. Drisdale stated that she based her testimony on surveillance tape

without allowing appellant to review tape for cross examination. MESSC Hearing Officer erred by

not continuing the hearing until the tape could be review by all parties. Turner v. State, 2005-CA-

02069COA (Miss. App. 3-27-2007)

The Board of review adopted the findings of fact and opinion of the Appeals Referee, and

affirmed the appeals Referee's decision, which action on the part of the Board of review had the

practical effect of denying Austin's claim for unemployment compensation benefits. The Court

must find that, base on MESSC v. McLane-Southern, Inc., 583 So.2d 626, 628-629 (Miss. 1991).

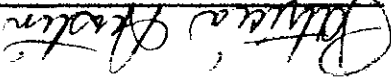
The employer put on no live witnesses of the incident, but only uncorroborated hearsay statements of the fellow employers. Willie Jackson, Terry Williams and Sammie Lofton were the alleged

material witnesses that was actual involved in the alleged incidents, but did not make themselves available to give evidence or to testify against Ms. Austin nor did they make available any signed written statements or affidavits to be added to the record. Ms. Austin had need to cross examine these alleged witnesses but was not able to do so because of their absences. There were no video tapes made available to be interviewed by Ms. Austin for cross examination Ms. Drisdale alleged testimony. Ms. Austin nor the Court can assume that Ms. Drisdale's uncorroborated hearsay testimony about what she allegedly seen on the video tape were exactly true. Therefore, there was no proof presented of any other incidents like the one that caused Austin's termination. The employer did not meet their burden of misconduct as defined in the law and there was not "substantial evidence" of employee misconduct such as would disqualify an employee from receiving unemployment benefit.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant Austin prays that this Honorable court reverse the finding and ruling of the Tunica County Circuit Court and remand the case with instructions to grant Austin her unemployment benefit.

Respectfully submitted,


Patricia Austin, Appellant Pro se
P. O. Box 637
Como, Mississippi 38619

CERTIFICATE OF SERVICE

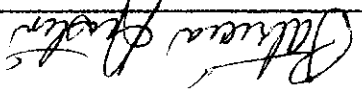
I, Patricia Austin, do certify that I have mailed first class, via U. S. Postal Service, postage

prepaid, a true and correct copy of "Brief of Appellant" to the following parties:

Hon. LeAnn F. Brady, Senior Attorney
Mississippi Department of Employment Security
Post Office Box 1699
Jackson, Mississippi 39215-1699

Fitzgerald Casino
P. O. Box 327
Robinsonville, Mississippi 38564

This, the 27th day of June, 2007.



Patricia Austin, Appellant Pro se