IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2007-CC-433

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY — PLAINTIFF/APPELLANT

VS.

JOHN JOHNSON, II
And GREENVILLE PUBLIC SCHOOLS — DEFENDANT/APPELLEES

BRIEF OF THE APPELLANT, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY (F/K/A MISSISSIPPI EMPLOYMENT SECURITY COMMISSION)

APPEAL FROM THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI
CAUSE NO. CI2006-221

ORAL ARGUMENT NOT REQUESTED

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VS.

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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", Plaintiff-Appellant
2. John Johnson, II, Defendant-Appellee
3. Greenville Public Schools, Defendant-Appellee
4. Honorable Margaret Carey-McCray, Circuit Judge, Washington County

This the 31st day of July, 2007.

LeAnne F. Brady

LeAnne F. Brady, Esq.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY — **PLAINTIFF/APPELLANT**

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BRIEF OF THE APPELLANT MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY (f/k/a MISSISSPPI EMPLOYMENT SECURITY COMMISSION)

STATEMENT OF ISSUE

Whether the lower court's interpretation of the Little case is erroneous and the decision of the Board of Review affirming the Administrative Appeals Officer's decision dismissing the Claimant's appeal should be affirmed.

STATEMENT OF THE CASE

John Johnson [also hereafter referred to as "Claimant"] was employed as an instructor at Greenville Public Schools [also hereafter referred to as "Employer"], in Greenville, Mississippi, ending June 13, 2006. (R. Vol. 2 p. 1). Mr. Johnson's contract with Greenville Public Schools was not renewed because he failed to perform his work up to the standards required by the employer. (R. Vol. 2 p. 5).

On July 6, 2006, Mr. Johnson filed for unemployment benefits. (R. Vol. 2 p. 1). An MDES interviewer investigated Mr. Johnson's separation by speaking with the Employer and the Claimant (R. Vol. 2. p. 3). During these conversations, the Employer stated that Mr. Johnson was not doing his job, and the school district elected not to renew his contract. (R. Vol. 3 p. 3). Mr. Johnson stated that he was told that his contract would not be renewed because he was not doing his job. (R. Vol. 2 p. 3). The claims examiner disqualified Mr. Johnson from receiving

unemployment benefits for misconduct connected with work. (R. Vol. 2 p. 5). On July 25, 2006, the Claimant filed an appeal and a telephonic hearing before the Administrative Appeals Officer[1] [hereafter referred to as "AAO"] was held on August 25, 2006. (R. Vol. 2 p. 6-7). Mr. Johnson failed to participate at the hearing. (R. Vol. 2 p. 9-10). Based upon the record, the AAO found the Claimant abandoned his appeal and therefore, the claims examiner's decision was followed. (R. Vol. 2 p. 9-10, RE p. 8-9). Specifically, the AAO's Findings of Fact and Opinion are as follows, to wit:

> This case came on before the Administrative Appeals Officer on appeal by John D. Johnson, II (the claimant) for a telephone hearing scheduled for August 25, 2006, at 8:30 a.m.
>
> The Appeals Tribunal Office mailed a Notice of Hearing to the interested parties on August 16, 2006.
>
> After due notice was provided for the date, time, and place of the hearing, no one was available to participate. The claimant-appellant in this case has not given notice of any reason or cause for non-appearance.
>
> The Mississippi Department of Employment Security Appeal Regulation 10 provides that a default ruling may be entered against the appellant for failing, without good cause, to appear at a hearing. Upon abandonment of a request for a hearing or appeal by the party who filed it, the Administrative Appeals Officer may dismiss the appeal or request for a hearing.
>
> A party shall be deemed to have abandoned a request for a hearing if neither the party appealing nor his/her representative appears at the time and place fixed for the hearing and prior to the hearing such party does not show good cause why he/she or his/her representative cannot appear.
>
> As of the date of this order, the appellant did not appear or show cause for non-appearance. The Administrative Appeals Officer, having determined that the appeal has been abandoned, hereby DISMISSES the appeal.

(R. Vol. 2 p. 9, RE p. 8).

[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."

The Claimant appealed to the Board of Review and after careful review and consideration, the Board of Review affirmed and adopted the AAO's Findings of Fact and Opinion. (R. Vol. 2 p. 11-13, RE p. 7). Aggrieved, the Claimant perfected his appeal of the Board's decision to the Circuit Court of Washington County on October 6, 2006. (R. Vol. 1 p. 8, RE p. 6).

On January 22, 2007, the Honorable Margaret Carey-McCray, entered an order overruling the decision of the AAO dismissing the Claimant's appeal and awarded benefits to Mr. Johnson. (R. Vol. 1 p. 6, RE p. 1-5).[2] Judge Carey-McCray cites to Little v. Miss. Emp. Sec. Comm'n and Kentucky Fried Chicken, 754 So. 2d 1258 (Miss. Ct. App. 1999), as the basis for her opinion. (R. Vol. 2 p. 6, RE p. 1-5). In her order, Judge Carey-McCray found that the employer had the burden of proof, and therefore the employee was not required to offer rebuttal evidence or an explanation. (R.Vol. 2 p. 5, RE p. 1-5). Judge Carey-McCray ruled that requiring the employee to offer evidence to rebut the employer's allegation of misconduct, was an improper shifting of the burden of proof, and therefore Mr. Johnson should be awarded benefits. (R. Vol. 1 p. 5-6, RE p. 1-5).

Aggrieved by this decision, the Mississippi Department of Employment Security filed its appeal to this Honorable Court on February 13, 2007. (R. Vol. 1 p. 38).

SUMMMARY OF THE ARGUMENT

The lower court's reliance on the holding in Little v. Miss. Emp. Sec. Comm'n and Kentucky Fried Chicken, 754 So. 2d 1258 (Miss. Ct. App. 1999), is erroneous in that Little is factually different from the case at bar. In the present case, the Claimant did not participate in the hearing before the AAO, even though he filed the appeal. The notice of hearing received by

[2] The parties did not file briefs in this matter in the lower court. It appears from the record that the Claimant, Mr. Johnson, did send a letter to the court, which was filed on Nov. 13, 2006, (See R. Vol. 1 p. 11); however, the Appellant MDES never received a copy of this letter. MDES was not aware of this letter until it received a copy of the record for this appeal, and does not know if the lower court considered this as Mr. Johnson's brief.

the Claimant clearly states that it was his responsibility to notify MDES with his contact information on the day of the hearing. On the day of the hearing, the Claimant had not provided his contact information and the AAO was forced to dismiss the appeal. This decision was affirmed by the Board of Review.

In Little, it was the employer who failed to participate and offer evidence that the claimant committed disqualifying misconduct. The employee filed the appeal and was present to give testimony. In the present case, no one participated in the hearing; therefore, the AAO dismissed the appeal and the Department followed the decision of the claims examiner. MDES asserts that the claimant abandoned his request for an appeal and this Honorable Court should affirm the decision of the Board of Review.

ARGUMENT

I. Standard of Review

The provisions of Section 71-5-531, Mississippi Code Annotated of 1972 (Revised 2000), govern this appeal. That section provides that the Circuit Court will consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, will accept the Findings of Fact if supported by substantial evidence. Richardson v. Mississippi Employment Security Commission, 593 So. 2d 31 (Miss. 1992); Barnett v. Mississippi Employment Security Commission, 583 So. 2d 193 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982).

In Barnett, the Mississippi Supreme Court stated that:

> {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, if the Board's findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing court must affirm. Id.

II. The lower Court erred in its interpretation of the Little case and the decision of the Board of Review affirming the AAO's decision dismissing the Claimant's appeal should be affirmed.

On July 20, 2007, the Claims Examiner determined that the Claimant was disqualified from receiving unemployment benefits because he committed misconduct connected with work, specifically the claimant was not performing to the standards the employer required. (R. Vol. 2 p. 5). The Claimant appealed this decision, and a hearing was set before an AAO. (R. Vol. 2 p. 5). Notice of the hearing was mailed on August 16, 2006. (R. Vol. 2 p. 7). The notice states in bold letters that the Claimant must promptly notify MDES of his contact information for the day of the hearing by using a toll-free number. (R. Vol. 2 p. 7).

The AAO dismissed the appeal because Mr. Johnson failed to appear, which means that he did not call the toll-free number and provide his contact information.

MDES Appeal Regulation D 10 states as follows:

> A party shall be deemed to have abandoned a request for a hearing if neither the party appealing nor his/her representative appears at the time and place fixed for the hearing and prior to the hearing such party does not show good cause why he/she or his/her representative cannot appear.

Mr. Johnson filed the appeal; therefore, he was the aggrieved party. Under MDES Appeal Regulation 10, it was his duty to participate in the hearing. Since he did not participate, the appeal was dismissed, and the decision of the claims examiner was followed. This was proper under the law and the lower court's reliance on the Little case in erroneous and factually different from the case *sub judice*.

In Little, the employee filed the appeal from the decision of the claims examiner. Little, So. 2d at 1258 (¶4). At the hearing, the employer failed to appear or to communicate its intent to participate. Id. The employee was present for the hearing and responded to questions by the AAO. Id. The AAO affirmed the decision of the claims examiner, and this action was affirmed by the Board of Review, as well as the circuit court. Id.

On appeal before this Honorable Court, this decision was reversed, holding the following:

> In the absence of evidence of misconduct established by KFC, Little was not required to offer rebuttal evidence or an explanation. The requirement by the referee that Little offer evidence to rebut KFC's allegation of misconduct, when no evidence of misconduct had been offered, was an improper shifting of the burden of proof.

Id. at 1260 (¶11).

The facts from Little are distinguishable from the present case. In Little, the employee participated in the hearing. In this case, neither the claimant nor the employer participated. While the claimant did not have the burden of proof, he filed the appeal and therefore, had a duty to appear. The purpose of the holding in Little, was to protect a participating claimant from having to rebut a claim of misconduct, when no evidence had been submitted by the employer. Furthermore, in this case, no testimony was taken and no evidence was considered, therefore the question of the burden of proof was never before the AAO. The AAO simply dismissed the appeal, and therefore, the Department followed the decision of the claims examiner.

In Mr. Johnson's circumstance, neither party appeared to give evidence. Under MDES Reg. 10, MDES has the authority to dismiss an appeal, when the appellant has failed to participate. This is a common principle under the law. Under Rule 41 of the

Mississippi Rules of Civil Procedure, the clerk of the court may dismiss an action for want of prosecution because the plaintiff has failed to pursue the case diligently toward completion. Even this Honorable Court has a dismissal procedure in place when a party fails to properly prosecute an appeal. Under Rule 2(a)(2) of the Rules of Appellate Procedure, "an appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court when the court determines that there is an obvious failure to prosecute an appeal."

MDES asserts that the Little case only applies to those situations in which one party to the appeal appears and the other party fails to participate. This was not the circumstance in the case at bar. Mr. Johnson failed to participate in a hearing he requested and the AAO's dismissal was proper under the law. Therefore, the Appellant, MDES, respectfully requests that this Court reverse the decision of the lower court and affirm the decision of the Board of Review.

CONCLUSION

The lower court's interpretation and application of Little was improper. The decision of the Board of Review affirming the dismissal of Mr. Johnson's appeal should be affirmed.

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

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

LeAnne F. Brady

LEANNE F. BRADY
MS BAR NO. [redacted]

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 Brief of the Appellant to:

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Greenville, MS 38703

Greenville Public Schools
P.O. Box 1619
Greenville, MS 38702

Hon. Margaret Carey-McCray
Washington County Circuit Court Judge
P.O. Box 1775
Greenville, MS 38072

This the 31st day of July, 2007.

Respectfully Submitted,

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