IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CC-02236

LINDA JOHNSON — APPELLEE

VS.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND CITY OF CLINTON — APPELLANTS

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# BRIEF OF APPELLEE LINDA JOHNSON

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**ORAL ARGUMENT REQUESTED**

## CERTIFICATE OF INTERESTED PERSONS

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 Judge of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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4. City of Clinton, Mississippi and the Mayor and Board of Aldermen of Clinton, Mayor Rosemary G. Aultman and Aldermen Jehu W. Brabham, Tony Hisaw, Tony Greer, Mike Bishop, Kathy Peace, Mike Morgan, Bill Barnett

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7. Honorable W. Swan Yerger
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This the 26th day of August, 2008.

Respectfully submitted,

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## STATEMENT OF THE ISSUE

I. Was the Hinds County Circuit Court correct in overturning the Board of Review's decision to deny unemployment benefits to Linda Johnson as that ruling did not, as a matter of law, support a finding of "misconduct" based upon substantial, clear and convincing evidence?

## STATEMENT OF THE CASE

This case involves an original Complaint for Review by Appellee Linda Johnson ("Ms. Johnson") for denial of unemployment benefits from Appellants City of Clinton (hereinafter "Clinton" or "Appellants") and the Mississippi Department of Employee Security Commission (hereinafter "MDES" or "Appellants"). (R. Vol. 1, p. 2)[1] Ms. Johnson was terminated from her employment with the City of Clinton in October of 2007 and thereafter applied for unemployment benefits which were approved. (R. Vol. 1, p. 8) Ms. Johnson began receiving unemployment benefits while she searched for another job, however after receiving $1,512.00, the City of Clinton disputed Ms. Johnson's award of unemployment benefits. *Id.* The MDES held a telephonic hearing on January 4, 2007, conducted by the Administrative Law Judge wherein there was ample evidence presented by both Ms. Johnson and the City of Clinton. (R. Vol. 1, p. 9). The MDES then found that Ms. Johnson was not due unemployment benefits and ordered that she re-pay the $1,512.00 that she had already received. *Id.* Ms. Johnson appealed this decision however, on February 12, 2007, the Board of Review affirmed the Administrative Law Judge's decision that Ms. Johnson was ineligible for unemployment benefits and that she must further make immediate restitution for unemployment benefits already received. (R. Vol. 1, p. 53)

After Ms. Johnson had exhausted all Administrative remedies, Ms. Johnson then retained counsel through the Mission First Project and appealed the MDES decision on October 29, 2006. (R. Vol. 1, p. 8) The Circuit Court of Hinds County held oral argument on September 14, 2007, (R. Vol. 2, p. 161). At the conclusion, the Honorable Swan Yerger found that, the undisputed evidence did not support the agency's determination that Ms. Johnson committed disqualifying misconduct during her employment, which would prevent her from receiving unemployment

[1] References herein are made to the Record Volume __, page __ (R. Vol. __, p. __).

benefits. (R. Vol. 2, p. 161) As a result, the Hinds County Circuit Court held that Ms. Johnson was entitled to unemployment benefits and that she did not have to repay benefits previously paid to her. *Id.* Thereafter the City of Clinton and MDES filed an appeal to dispute the ruling of the Hinds County Circuit Court. (R. Vol. 2, p. 163).

Ms. Johnson asserts that the Hinds County Circuit Court was correct in reversing the MDES Board of Review's decision to deny her unemployment benefits as her termination was not based on "misconduct" as required under Mississippi law. (R. Vol. 2, p. 161)

Ms. Johnson requests that this Court affirm the decision of the Hinds County Circuit Court Judge, the Honorable Swan Yerger, and hold that Ms. Johnson is entitled to unemployment benefits and does not have to reimburse the agency for payments already received.

## STATEMENT OF THE FACTS

Ms. Johnson was hired as a receptionist for the City of Clinton Parks & Recreation Division on July 21, 2003. (R. Vol. 3, p. 30) Previously, she had retired from Bellsouth after a thirty year career. (R. Vol. 1, p. 46) Ms. Johnson was employed by Clinton for three years and three months until her employment ended on October 27, 2006. *Id.* Her first two years of employment with Clinton were without incident. *Id.* In October 2005, the Parks & Recreation Division began undergoing a period of rapid growth in which everyone, including Ms. Johnson, took on added responsibilities.[2] (R. Vol. 3, pp. 54-55) During this time, Ms. Johnson incurred one isolated reprimand for locking her desk workstation while she went to lunch. (R. Vol. 3, p. 77). Ms. Johnson's boss, Ray Holloway (hereinafter "Mr. Holloway" or "Director"), was out of town and Ms. Johnson's new supervisor had asked her to leave her workstation open. *Id.* Ms. Johnson testified that she locked the workstation because she had a substantial sum of cash with her that day to take to the bank after work; however, she did not want to carry the cash on her person to lunch. *Id.* Therefore, she was forced to lock the money in her workstation. *Id.*

Ms. Johnson's employment continued satisfactorily during the next year until July 2006 when she received another reprimand for failing to complete an assignment, which called for her to prepare passes for a four day soccer and softball tournament. (R. Vol. 1, p. 47; R. Vol. 3, p. 70) She failed to complete the assignment on time because she lacked the proper computer skills and she had never previously been asked to do an assignment of that type. (R. Vol. 3, p. 71) Ms. Johnson testified that although her responsibilities had increased over the past year, those responsibilities did not include increased computer work nor did they include any new computer

[2] Johnson's duties as receptionist before the growth period included helping with administrative task in the office, reception, answering the telephone, filing, general office work, and data entry. (R. Vol. 3, p. 26) Her receptionist's duties also included preparing correspondence and receipts, maintaining inventory and asset reports, and assisting with timecards and payroll. *Id.*

training. (R. Vol. 3, pp. 71-72). Nonetheless, Ms. Johnson testified that she did attempt to get computer training at her own expense at a local junior college. (R. Vol. 3, p. 67). She also requested training through the city, but Mr. Holloway never offered her any training opportunities. *Id.* Ultimately, Ms. Johnson was not able to complete her computer class because her work responsibilities precluded her from getting to class on time. *Id.* Mr. Holloway testified that he was aware that she was taking an independent class and he felt that he had afforded her ample time to get to class on time. (R. Vol. 3, p. 101)

The next month, August 2006, Ms. Johnson was reprimanded and suspended for three days for inadvertently leaving a cash drawer unsecured overnight. (R. Vol. 1, p. 47) Ms. Johnson testified that the cash draw was supposed to be left open during the day for office use and then locked at night. (R. Vol. 3, pp. 87-88) She stated that Gisele Champlin (hereinafter "Ms. Champlin"), the Directors administrative assistant, had signed off on the cash drawer before Ms. Johnson left work that day. *Id.* Ms. Champlin testified that she did not sign-off on the cash drawer that day and that she (Ms. Champlin) was the person who issued the reprimand for Johnson. (R. Vol. 3, p. 129) Mr. Holloway later suspended Johnson for 3 days over the cash-drawer incident, however there was no money missing from the cash drawer being left unlocked during the night. *Id.*

On August 14, 2006, Ms. Johnson filed a grievance with the Mayor's Office concerning her employer and her working conditions at the Parks & Recreation Division. (R. Vol. 1, p. 47) Ms. Johnson felt that she was being discriminated against because of her age and that the Director's behavior towards her was hostile. *Id.* Upon filing the grievance, Johnson met with the personnel officer for Clinton, Robyn Cornelius (hereinafter Ms. Cornelius), to discuss the complaint. (R. Vol. 3, p. 76) Ms. Cornelius informed Ms. Johnson at the beginning of the interview that she (Ms. Cornelius) and Ms. Champlin were "very good friends," but their

friendship would not interfere with the investigation. (R. Vol. 3, p. 77) Ms. Johnson testified that she already knew about their friendship prior to filing the grievance. *Id.* After interviewing Ms. Johnson, Ms. Cornelius conducted her investigation of the grievance but found all of Ms. Johnson's complaints unwarranted. (R. Vol. 1, p. 47) Ms. Johnson testified that after the investigation, the situation in the office became "100%" more hostile and she was basically shunned by the other employees. (R. Vol. 3, pp. 74-75) She further stated that the grievance was not the cause of her termination, but that she believed the grievance did contribute to her termination. *Id.* Mr. Holloway testified that he had been "upset" and "disappointed" over the grievance but denied the other claims made by Ms. Johnson. (R. Vol. 3, p. 106)

On October 27, 2006, two months after she filed the grievance, Ms. Johnson was terminated from her employment with Clinton by Mr. Holloway for not completing a mass mailing and labeling project regarding 550 letters and labels. (R. Vol. 1, p. 47) On October 16, 2006, Mr. Holloway sent Johnson an email asking her had she spoken with Ms. Champlin about letters that needed to be sent out to participants for the National Senior Olympics. (R. Vol. 1, p. 17) Ms. Johnson was out of the office on October 17 but responded to the email on October 18 stating that she had not spoken with Ms. Champlin, and Ms. Johnson also requested the information that needed to be contained in the letters so that she could begin work on the project. *Id.* Ms. Johnson did not know how to complete the project due to her lack of computer skills, so she solicited help from Ms. Champlin because the project was due on October 25. (R. Vol. 1, p. 47)

On several occasions, Ms. Champlin tried to show her how to do a mail merge to make the labels but would either not finish instructing Ms. Johnson, experience computer difficulties, or was also unable to figure out how to do the mail merge herself. (R. Vol. 3, pp. 92-95) Between the dates of October 18 and October 25, Ms. Johnson in good faith, attempted to work

on the project to the best of her ability. *Id.* She entered 550 addresses into the computer and printed 550 letters, but these letters were unacceptable to Ms. Joyce Anderson, another supervisor in the department. (R. Vol. 3, p. 94) Ms. Johnson testified that Mr. Holloway was made aware by Ms. Champlin that the 550 letters and labels were not ready prior to the deadline; however, knowing of the problem, neither he nor Ms. Champlin took any action. (R. Vol. 3, pp. 94-95) Ms. Champlin also testified that she had informed Mr. Holloway that the project was incomplete before the deadline.[3] (R. Vol. 3, p.131) On October 27, Ms. Johnson sent Mr. Holloway an email telling him that the project had not been completed and requested more help stating that she would be "willing to do all that is possible" to complete the project. (R. Vol. 1, p. 18) Feeling dissatisfied with Ms. Johnson's work on the massive mail-out project, Mr. Holloway terminated her. (R. Vol. 3, pp. 41-46)

[3] In Mr. Holloway's testimony, he also corroborated the fact that he knew the letters were not complete prior to October 27 (the date Johnson sent him an email informing him that the project was not complete). (R. Vol. 3, p. 103)

## SUMMARY OF THE ARGUMENT

The circuit court's order overturning the Board of Review's decision to deny unemployment benefits in the instant case was proper because the Board of Review's finding of misconduct was not based on substantial, clear and convincing evidence. Under Mississippi case law, for a finding of misconduct, an employee's actions must be willful and wanton, grossly negligent, and an intentional disregard of the employee's duty and the employer's interests. Also, the employer bears the burden of proving by substantial, clear and convincing evidence that the claimant's actions constituted disqualifying misconduct.

In the instant case, Ms. Johnson's failure to complete certain work related tasks was the result of nothing more than inability, inefficiency, and a lack of training. Furthermore, she made good faith efforts to complete the tasks she was presented with despite her failure to complete those tasks. The Appellants failed to present substantial, clear and convincing evidence that Ms. Johnson's actions were willful or wanton or of an evil design. Appellants also failed to present substantial evidence proving that Ms. Johnson's conduct was grossly negligent or an intentional disregard of her duties or her employer's interests. Furthermore, Ms. Johnson should not be required to remunerate the MESD for previously paid unemployment benefits because she made no misrepresentations nor did she fail to disclose any material facts to the claims examiner. Hence, this Court should affirm the decision of the Honorable Swan Yerger of the Hinds County Circuit Court which granted Ms. Johnson unemployment benefits and that she is not required to repay the MESD for the benefits that she has already received.

## ARGUMENT

### I. Standard of Review. The de novo standard of review is used when overturning a Board of Review decision and the review is limited to questions of law.

Mississippi Code Ann. § 71-5-531 states that a Board of Review's findings as to the facts of a case are to be conclusive "if supported by evidence and in the absence of fraud," and the appellate court's jurisdiction is limited to "questions of law." *Scott v. Miss. Employment Sec. Comm'n*, 892 So. 2d 291, 292 (Miss. Ct. App. 2004). In an appeal regarding the denial of unemployment benefits, the Board of Review's decision may only be overturned if it is "(1) unsupported by substantial evidence, (2) arbitrary or capricious, (3) beyond the scope of power granted to the agency, or (4) in violation of the employee's constitutional rights." *Id.*; *Miss. Employment Sec. Comm'n v. Noel*, 712 So. 2d 728, 730 (Miss. Ct. App. 1998); *see Beverly Enters. v. Miss. Div. of Medicaid*, 808 So. 2d 939, 941 (Miss. 2002) (holding that the Mississippi Supreme Court is bound to follow the standard of review used by the circuit or chancery court when reviewing an agency action). An agency decision must be reversed by the Court if the decision violates a party's constitutional or statutory right. *Beverly Enters.*, 808 So. 2d at 941; *Trading Post, Inc. v. Miss. Employment Sec. Comm'n*, 924 So. 2d 634, 635 (Miss. Ct. App. 2006). In an unemployment benefits action, "the employer has the burden of showing by 'substantial, clear and convincing evidence' that the former employee's" actions warrant a finding of disqualifying misconduct. *City of Clarksdale v. Miss. Employment Sec. Comm'n*, 699 So. 2d 578, 580 (Miss. 1997); *Foster v. Miss. Employment Sec. Comm'n*, 632 So. 2d 926, 927 (Miss. 1994).

The courts have held that substantial evidence is not a "'mere scintilla' or suspicion," but rather substantial evidence is "'such relevant evidence as reasonable minds might accept as adequate to support a conclusion.'" *Hospital Housekeeping Systems, Inc. v. Townsend*, --- So. 2d ----, 2008 WL 2809060 at *6 (Miss. Ct. App. 2008) (citing *ABC Mfg. Corp. v. Doyle*, 749 So. 2d

43, 45 (Miss. 1999). In addition, "if an '[administrative] agency has misapprehended a controlling legal principle,'" then the reviewing court owes no deference to the agency's decision and the reviewing court will use a de novo standard of review. *Id.* at *5.

## II. The Board of Review's decision to deny unemployment benefits violated Ms. Johnson's statutory right to those benefits because the Appellant's failed to present substantial, clear and convincing evidence that her failure to complete a computer project constituted "misconduct" under Mississippi law.

The circuit court was correct in reversing the Board of Review's decision and holding that Ms. Johnson's actions did not equal disqualifying misconduct. Mississippi Code Ann. § 71-5-513 states that an "individual shall be disqualified for benefits . . . [if] he was discharged for misconduct connected with his work . . . ." *Allen v. Miss. Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994). Mississippi case law has subsequently defined misconduct as

> conduct evincing such *willful* and *wanton* disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee. . . [and] 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.

*Allen*, 639 So. 2d at 907 (emphasis added); *Acy v. Miss. Employment Sec. Comm'n*, 960 So. 2d 592, 594-95 (Miss. Ct. App. 2007); *City of Clarksdale*, 699 So. 2d at 581; *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). The courts have also held that "[m]ere inefficiency, unsatisfactory conduct, 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.'" *Allen*, 639 So. 2d at 907 (citations omitted).

When determining what actions constitute misconduct, an objective standard is to be applied. *Allen*, 639 So. 2d at 907 (citations omitted). An employee's actions constitute misconduct when "reasonable and fair-minded external observers would consider [the actions] a *wanton* disregard of the employer's legitimate interest." *Allen*, 639 So. 2d at 907 (citations

omitted). Employee actions equivalent to "mere negligence" do not amount to disqualifying misconduct. *Id.*

**A. Undisputed facts stating that Ms. Johnson failed to complete a large computer project do not constitute substantial, clear and convincing evidence necessary for finding work related misconduct.**

When comparing Ms. Johnson's conduct during her employment with the definition of "misconduct" in the case law, Ms. Johnson's actions clearly do not constitute disqualifying misconduct. The facts contained in the record, including the testimony therein, clearly show that although Ms. Johnson was fired for failing to complete certain work related duties, her conduct did not amount to a reckless or grossly negligent disregard of her employer's interests nor were her actions a willful or wanton, or an intentional disregard of her duties.

In the instant case, Mr. Holloway testified that Ms. Johnson failed to complete two computer projects that were assigned to her, the second failure resulting in termination. (R. Vol. 3, pp. 41-53) Yet, the appellants presented no substantial evidence that these failures were "willful, wanton, or grossly negligent," actions on the part of Ms. Johnson. *See Allen*, 639 So. 2d at 906 (misconduct equals grossly negligent, willful, wanton, and intentional behavior on the part of the employee in disregarding the interests of the employer). Rather, Mr. Holloway testified that Ms. Johnson's skill level on the computer presented no problems during her first two years of employment. (R. Vol. 3, p. 109) He stated that her job involved normal computer skills, which included basic computer tasks such as individual letter writing and label writing. (R. Vol. 3, p. 108) Mr. Holloway testified that it was not until July 2006, during the departments rapid growth and expansion, that Ms. Johnson started experiencing difficulties in performing her job. (R. Vol. 3, pp. 54-55) Even then, Mr. Holloway admitted that Ms. Johnson asked for help with her new responsibilities on several occasions. (R. Vol. 3, p. 56)

The Board of Review concluded that Ms. Johnson had been terminated for her failure to complete a computer mail-merge assignment within the assigned deadline. (R. Vol. 1, p. 9) The Administrative Law Judge determined that Ms. Johnson's conduct, which caused her discharge, amounted to disqualifying misconduct under the law. As the Hinds County Circuit Court correctly found, not only did the Administrative Law Judge misapprehend the legal application of "misconduct" , the Appellants further did not present substantial evidence for the Administrative Law Judge to rely on in her holding. In regards to the October 2006 mail-merge project, Mr. Holloway testified that he was not sure if Ms. Johnson had received proper instructions concerning the project, but he thought that she had been shown how to do the mail-merge on the computer. (R. Vol. 3, p. 46) On October 16, 2006, Mr. Holloway sent Ms. Johnson an email asking her had Ms. Champlin spoke with her about completing the mail-merge assignment. (R. Vol. 3, p. 42) On October 18, Ms. Johnson responded to the email (she had been absent from work on the 17th) and stated that she had not spoken to Ms. Champlin and she was not sure how to complete the assignment. (R. Vol. 3, pp. 42-43) Mr. Holloway testified that he responded by email to Ms. Johnson on October 23 and sent Ms. Johnson an example letter and address form to complete the mail-merge assignment. *Id.* He then testified that he did not hear from Ms. Johnson until October 27 when she informed him by email that the project had not been completed by the deadline of October 25. (R. Vol. 3, pp. 43-45)

However, Ms. Johnson testified that she had requested help on the assignment from Ms. Champlin, but neither she nor Ms. Champlin could figure out how to perform the mail-merge on the computer. (R. Vol. 3, pp. 64-65) Ms. Johnson also testified that she had printed out the necessary letters to mail out for the project, but Ms. Joyce Anderson (another supervisor over the mail-merge project) informed Ms. Johnson that the sample letters Ms. Johnson had used — the letters sent by Mr. Holloway on October 23 — were not acceptable because they had too many

errors. *Id.* Although Ms. Johnson did not notify Mr. Holloway until October 27 that the project was not complete, Ms. Johnson testified that Mr. Holloway knew before October 27 that the project had not been completed. (R. Vol. 3, pp. 94-95) Ms. Champlin and Mr. Holloway both corroborated that Mr. Holloway knew prior to October 27 that the project was not finished. (R. Vol. 3, p. 103, 131) In fact, Mr. Holloway admitted that Ms. Johnson explained by email that she had been working for days to enter the information and that because of her inexperience she was unable to complete the project, but that she was "more than willing to do all that is possible to work to complete this necessary project." (R. Vol. 3, p. 45) Even with Ms. Johnson's lack of ability to complete the project, she made good faith efforts to perform her duties and did ask for help on several occasions. (R. Vol. 3, p. 65, 92) She also testified that "she begged for help in every way daily" and previously attempted to take computer classes at her own expense to acquire the necessary skills. (R. Vol. 3, p. 67, 95) In spite of her efforts, Ms. Johnson was still unable to perform the large-scale computer projects, which resulted in her termination.

The Board of Review's decision stating that Ms. Johnson's failure to complete a computer project constitutes disqualifying misconduct is not based upon substantial evidence and certainly misapprehends the legal meaning of "misconduct". This is especially true where Ms. Johnson made a good faith attempt to complete the project to the best of her ability. *See Joseph v. Miss. Employment Sec. Comm'n*, 771 So. 2d 410 (Miss. 2000) (holding that good faith errors, although they may cause an employee to be discharged due to company policy, do not amount to disqualifying misconduct for unemployment benefits). The circuit court was correct in overturning the Board of Review's decision because the record lacks any evidence of wrongful intent, evil design, carelessness or gross negligence on the part of Ms. Johnson. The record is clear that Ms. Johnson's work was satisfactory for over two (2) years until she was assigned duties for which she was not trained or qualified as they required knowledge with computers that

Ms. Johnson had never obtained during her 30 years of working. It is also clear from the record that the employer had notice that the project was not complete before the deadline and that Ms. Johnson continually asked for help in order to learn how to complete the project. As such, the Appellants failed to meet their burden of proving by clear and convincing, substantial evidence that Ms. Johnson's actions amounted to disqualifying misconduct. *See Allen*, 639 So. 2d at 904-907 (reversal of decision for MDES as the defendant did not meet its "burden of proving disqualifying misconduct by clear and convincing evidence). Therefore, this Court should affirm the circuit court's decision in overturning the Board of Review.

**B. Ms. Johnson's failure to complete the mail-merge computer project was the result of mere inefficiency and lack of ability and did not rise to the level of disqualifying misconduct.**

Although Ms. Johnson was validly terminated from her job due to her failure to complete work related tasks, her actions only amount to mere inefficiency, inability or incapacity, and ordinary negligence, failing to reach the level of disqualifying misconduct necessary for a denial of unemployment benefits. *See Foster*, 632 So. 2d 926, 927-29 (Miss. 1994) (holding that a UPS employee backing into poles on several occasions and running over a sign were accidental and resulted from "mere ineptitude" or negligence and did not arise to misconduct).

Although different facts are present in each case, the analysis by the court in *City of Clarksdale v. Mississippi Employment Security Commission*, 699 So. 2d 578, 580-83 (Miss. 1997), is analogous and also extremely relevant to the instant case. The court in *City of Clarksdale* reversed a decision of the Board of Review and held that a claimant's failure to pass a physical fitness test, which was required for employment, was misconduct disqualifying him from receiving unemployment benefits. *Id.* at 585. In *City of Clarksdale*, a police officer trainee failed to pass a physical fitness test and "displayed a lack of interest and made little effort to perform to the best of his ability" when preparing for the test. *Id.* at 582. The court held that the

police officer trainee had complete control over his preparation for his physical fitness test and his failure to pass the test amounted to disqualifying misconduct. *Id.* at 583. The court also held that because the officer trainee knew prior to attending the academy that he would have to pass the test to be certified, his employer had a reasonable expectation that the officer would pass the test and become certified. *Id.* at 582.

Unlike the officer in *City of Clarksdale*, Ms. Johnson actually went above and beyond her work related responsibilities and attempted to get computer training at a local junior college at her own expense. (R. Vol. 3, p. 67) The *City of Clarksdale* court, which held that the officer's actions constituted misconduct and he was not entitled to unemployment benefits, stated that the officer's ill-regard for training and failure to stay in shape for the physical fitness test were within his complete control, and, therefore, misconduct. 699 So. 2d at 582. Unlike the officer in *City of Clarksdale*, Ms. Johnson was not in control of the new duties that were assigned to her after she had been working at her job for over two (2) years, but she still made valiant attempts to obtain the proper skills necessary for the extra duties she was now being assigned. (R. Vol. 3, p. 67) However, Mr. Holloway did not accommodate her attempts to get needed training nor did he offer, despite Ms. Johnson's requests, to get her adequate training through seminars that were available for city employees. (R. Vol. 3, p. 68, 100) Therefore, Ms. Johnson's inability to perform assigned projects does not amount to disqualifying misconduct as it is defined under Mississippi case law. *See also, Armstrong v. Miss. Employment Sec. Comm'n*, 874 So. 2d 989 (Miss. Ct. App. 2004) (holding that a claimant who was terminated for failing to keep city parks clean did not commit disqualifying misconduct but, rather, his actions constituted ordinary negligence); *Gordon v. Miss. Employment Sec. Comm'n*, 864 So. 2d 1013 (Miss. Ct. App. 2004) (holding that a hospital employee who was fired for improperly handling dirty linens did not commit disqualifying misconduct because there was no evidence showing that claimant had

received training in handling dirty linens). Rather, Ms. Johnson's inability to perform was the result of a lack of training and the incapacity to perform a large-scale computer project.

Moreover, in contrast to the situation in *City of Clarksdale* where the city had reasonable expectations, that the police officer would pass his fitness test, Mr. Holloway did not have reasonable expectations that Ms. Johnson would be able to perform the heightened responsibilities placed upon her because of the "rapid growth" of the department. (R. Vol. 3, p. 54-55); *see Clarksdale*, 699 So. 2d at 582. The additional responsibilities asked of Ms. Johnson, including the massive mail-merge assignment which she was terminated for not completing, were not part of her original job description nor did she know that she would be expected to undertake extensive computer projects. Hence, Mr. Holloway could not have had reasonable expectations that Ms. Johnson would be able to perform duties that were not originally included in her job description and that she did not have the proper training to perform. Thus, her lack of ability and mere inefficiency in completing large computer projects does not constitute disqualifying misconduct. As a result, this Court should affirm the circuit court's order and grant unemployment benefits to Ms. Johnson.

## III. Despite Appellants' argument to the contrary, it is clear that Ms. Johnson's conduct falls within the negligence/ineptitude line of cases, and not the "grossly negligent" line of misconduct cases.

Despite Appellants' arguments, the instant case is similar to the line of cases involving mere ineptitude, unsatisfactory conduct, failure in good performance and inefficiency. *See Wheeler*, 408 So. 2d at 1381 (employee's conduct fails to rise to the level of misconduct where the employee lacked willfulness in failing to follow instructions); *Trading Post, Inc.*, 924 So. 2d at 634 (failure to follow instructions to end constant bickering with a co-worker was not misconduct where nothing in the record indicated an *intentional* refusal to obey instructions) (emphasis added); *Shannon Engineering & Construction, Inc. v. Miss. Employment Sec.*

*Comm'n*, 549 So. 2d 446 (Miss. 1989) (failure to act in a subservient manner to an overbearing employer is not misconduct); *Armstrong*, 874 So. 2d at 989 (failure to follow instructions did not rise to a level of carelessness and culpable negligence necessary for find of misconduct); *Gore v. Miss. Employment Sec. Comm'n*, 592 So. 2d 1008 (Miss. 1992) (violation of company policies and procedures was merely an exercise of poor judgment and nothing more).

Ms. Johnson does not dispute that she was reprimanded on other occasions prior to her termination, however, her conduct related to these reprimands represents nothing more than mere ineptitude, unsatisfactory conduct, or inefficiency. In July 2006, Ms. Johnson was issued a written reprimand for failing to complete a computer project requiring her to produce hundreds of passes for a four day soccer and softball tournament. (R. Vol. 3, p. 70) Ms. Johnson testified that she was given this project only several days before it was due and she was not able to complete it because she did not have the necessary computer skills. (R. Vol. 3, pp. 70-71) Ms. Johnson also testified that she was out sick one of those days and a teenager working in the department finished the passes on the day that Ms. Johnson was out. *Id.* Appellants argued that the teenager's ability to finish the assignment in one day was evidence that Ms. Johnson's actions were misconduct. Brief of Appellants at 9, Miss. Dept. of Employment Sec. and City of Clinton v. Linda Johnson, No. 2007-CC-02236 (Miss. filed June 10, 2008). Yet, Appellant's argument is ill-founded. Ms. Johnson's testimony clearly states that she did not have the necessary computer skills to complete the assignment, and, furthermore, one cannot rationally compare the computers skills of an average adult with the computer skills of a teenager and expect the skills sets to be similar. *See* Joey Frazier, *Teens Can Make Excellent Tinkerers*, 10 NO. 24 LAW P.C. 11 (September 15, 1993) (stating that many teens already know more about certain computer basics than a busy lawyer); Michael Edmund O'Neill, *Old Crimes in New Bottles: Sanctioning Cybercrimes*, 9 GEO. MASON L. REV. 237, 245-46 (2000) (stating that

teenagers have committed the most intelligent and well-known computer hacking crimes including accessing NASA and Pentagon computer databases and shutting down Internet sites such as Yahoo!, Amazon.com, Buy.com, E-Trade, and CNN.com); Lynn Thompson, *Tech-savvy Teens Teach Computer Skills at Library*, THE SEATTLE TIMES, Dec. 12, 2007, *at* http://seattletimes.nwsource.com/html/snohomishcountynews/2004065990_techteens12n.html.

The other incident where Ms. Johnson was reprimanded and suspended for 3 days consisted of an inadvertent failure to lock the office cash drawer. (R. Vol. 3, pp. 77, 87-88) Ms. Johnson testified that it was normal procedure for Ms. Champlin to sign-off on the cash drawer being locked at the end of the day, and Ms. Champlin did sign-off on it that day before Ms. Johnson left the office. (R. Vol. 3, pp. 87088) However, Ms. Champlin testified that she did not start signing off on the cash drawer until after this incident occurred. (R. Vol. 3, 129) Either way, at worst, this was a simple mistake by Ms. Johnson in forgetting to lock the cash drawer upon her departure from work that day. This incident was not a grossly negligent, willful, wanton or intentional action by Ms. Johnson to disregard her duties or her employer's interests.

Ms. Johnson was ultimately terminated for her inability to adequately complete a complicated computer project. Her conduct with regard to this project is similar to the *Wheeler, Armstrong*, and *Trading Post* plaintiffs, wholly lacking intentional or grossly negligent qualities. Just like these authorities, Johnson failed to adequately follow instructions. Further, nothing in the record suggests an *intentional* refusal or reckless disregard in obeying instructions. The Board of Review even recognized in its finding of fact that Ms. Johnson "had no idea how to complete the project, and solicited the help of her immediate supervisor." (R. Vol. 1, p. 9) Ms. Johnson simply lacked the ability to complete the difficult, extraordinary computer task. Even taken in conjunction with Ms. Johnson's other extraordinary July computer project and her cash drawer incident, there is simply not enough to support a finding, by clear and convincing

evidence, of misconduct. There is no question but that Ms. Johnson's actions were the result of ineptitude or ordinary negligence, not disqualifying misconduct.

The Appellants cite several cases for the proposition that the "instant case is akin to the misconduct line of cases involving *grossly negligent*, or willful and wanton conduct . . . ." Brief of Appellants at 11. Appellants cite *Mississippi Employment Security Commission v. Percy*, 641 So. 2d 1172 (Miss. 1994), which can be distinguished because it involves an employee's *intentional* act of falsifying time cards. *Young v. Mississippi Employment Security Commission*, 754 So. 2d 464 (Miss. 1999), is distinguishable as it involves an employee's *intentional* conduct in tricking her supervisor and then refusing to turn over her badge upon suspension, causing a safety risk. Similarly, *Halbert v. City of Columbus*, 722 So. 2d 522 (Miss. 1998), involves an employee who *intentionally* refused to submit to a required drug test. In *Kellar v. Mississippi Employment Security Commission*, 756 So. 2d 840 (Miss. Ct. App. 2000), the employee was found to have met the standard of misconduct where he was *intentionally* rude to customers, failed to stop for a security check, and stole canned pineapple from a salad bar and refused to pay for it when demanded. *Johnson v. Mississippi Employment Security Commission*, 767 So. 2d 1088 (Miss. Ct. App. 2000), can be distinguished because it involved "excessive anger," removal by the police, an *intentional* refusal to deliver mail, and an intentional refusal to obey orders. Appellants cited cases obviously involve an element of intent or "reckless disregard" that is not present in the instant case.

*Reeves*, *Shavers*, and *Claiborne* can be distinguished because they involve an employee failing to do a simple everyday task, whereas Ms. Johnson failed to do a difficult "extraordinary" task. In *Reeves v. Mississippi Employment Security Commission*, 806 So. 2d 1178 (Miss. Ct. App. 2002), an employee failed to do the simple task of merely cleaning up the machine parts that he burned. In *Shavers v. Mississippi Employment Security Commission*, 763 So. 2d 183

(Miss. Ct. App. 2000), the conduct at issue involved failing to clean a simple machine. *Claiborne v. Mississippi Employment Security Commission* 872 So. 2d 698 (Miss. Ct. App. 2004), involved an employee's failure to perform his basic everyday tasks, such as failing to close a slot machine door and failing to respond to a radio call. These cases are obviously distinguishable as Ms. Johnson was terminated for her failure to complete a new, complicated computer project. Mr. Holloway even testified to the fact that prior to the department's rapid growth and expansion, Ms. Johnson never experienced any problems completing her work on time. (R. Vol. 3, pp. 108-109) It was only when she was assigned these new difficult computer projects that she was unable to finish her work.

The other cases listed by appellants include cases where an employee was grossly negligent by placing other employees in danger. *Mississippi Employment Security Commission v. Barnes*, 853 So. 2d 153 (Miss. Ct. App. 2003), involved an employee's reckless disregard for his fellow employee's safety because of his continuous smoking of cigarettes around barrels of hazardous waste. *Hux v. Mississippi Employment Security Commission*, 749 So. 2d 1223 (Miss. Ct. App. 1999), involves sexual improprieties of married employees risking domestic violence at the job site. *Sojourner v. Mississippi Employment Security Commission*, 744 So. 2d 796 (Miss. Ct App.), involves gross negligence or reckless disregard where an employee placed a patient at risk of danger by lingering on the premises after being accused of abuse of residents. Ms. Johnson's conduct is clearly distinguishable as she never endangered her fellow employee's life or limb. All in all, it is clear that Ms. Johnson's mere inability to complete a difficult computer project does not fit within the mold of Appellants' cases illustrating gross negligence. An analysis of the Appellants' cases shows a clear distinction, as they involve a culpable standard of conduct, whereas the case at hand is based on mere ineptitude, lack of skill, and/or good faith errors in judgment.

## IV. Under Mississippi law, Ms. Johnson is not required to repay unemployment benefits she has already received.

In addition to affirming the circuit court's order to grant Ms. Johnson unemployment benefits, this Court should also affirm the circuit court's order holding that Ms. Johnson is not required to remunerate the MDES for benefits previously paid to her. According to *Acy v. Mississippi Employment Security Commission*, 960 So. 2d 592 (Miss. Ct. App. 2007), MDES can only seek remuneration from a claimant if "(1) a person [claimant] received benefits, (2) at a time when he was ineligible, (3) *by reason of nondisclosure or a misrepresentation of a material fact*, (4) made by that person to another, (5) irrespective of fraudulent intent or knowledge of the omitted or misrepresented fact." *Id.* Just like *Acy*, it is clear in this case that Ms. Johnson did not obtain the benefits at issue by nondisclosure or fraud; thus, "the Department is not entitled to use collection actions to obtain repayment." *Id.* Actually, the MDES's claims examiner initially granted Ms. Johnson unemployment benefits on December 4, 2006, because the employer, Clinton, failed to show the claims examiner that Ms. Johnson was discharged for misconduct connected with work. (R. Vol. 3, p. 3) Therefore, Ms. Johnson is not required to pay restitution to the MDES for the benefits she received.

## CONCLUSION

Ms. Johnson's actions while employed with the City of Clinton did not rise to the level of disqualifying misconduct under Mississippi law. Her failure to complete a difficult computer tasks, despite her best efforts which included repeatedly seeking help from her supervisors, and her inadvertent error at leaving a cash drawer unlocked overnight does not show culpability, *wrongful* intent, *evil* design, or an *intentional* or substantial disregard of the employer's interest, which are necessary elements for a finding of disqualifying misconduct. *See Allen v. Miss. Employment Sec. Comm'n*, 639 So. 2d 904, 907 (Miss. 1994). Rather, a reasonable and fair-minded observer would conclude that Ms. Johnson's conduct only amounts to mere inefficiency,

inability or incapacity. In fact, the evidence plainly demonstrates that Ms. Johnson, at most, was terminated for her inefficiency with computer skills. As such, substantial, clear and convincing evidence is lacking to support the Appellant's assertion that Ms. Johnson committed disqualifying misconduct. Therefore, as a matter of law, this Court should affirm the circuit court's order overturning the agency's decision to deny unemployment benefits to Ms. Johnson and reversing the agency's order to re-pay past benefits.

This is the 27th day of August, 2008.

LINDA JOHNSON

By: _____
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## CERTIFICATE OF SERVICE

I, Patricia J. Kennedy, one the Attorneys for Appellee, Linda Johnson, certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee, Linda Johnson to the following:

Honorable W. Swan Yerger
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This the 20th day of August, 2008.

Patricia J. Kennedy