2007-CC-02236

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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:

1. Linda Johnson

2. Courtney M. Williams, Esq.

3. Mississippi Department of Employment Security Commission

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

5. Kenneth R. Dreher

6. Albert Bozeman White, Esq.
   Assistant General Counsel for Mississippi Department of Employment Security Commission

7. W. Swan Yerger, Hinds County Circuit Court

This the 10th day of June, 2008.

Respectfully submitted,

Kenneth R. Dreher [MSB# [redacted]
Attorney for City of Clinton, MS

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

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND CITY OF CLINTON — APPELLANTS

VS.

LINDA JOHNSON — APPELLEE

BRIEF OF APPELLANT CITY OF CLINTON

STATEMENT OF ISSUE

1. Whether the Circuit Court erred, as a matter of law, by failing to affirm the actions and findings of the Administrative Law Judge and the Board of Review of the Mississippi Department of Employment Security.

STATEMENT OF THE CASE

The Appellee, Linda Johnson [hereinafter also "Johnson"] was employed by City of Clinton [hereinafter also "Clinton"] as a receptionist from November 1, 2003, until October 27, 2006, when she was terminated. (R.Vol.3, p.40). She was terminated for repeatedly failing to follow the Employer's instructions about performing certain job duties and for insubordination. Johnson had been repeatedly counseled about these matters. (R.Vol.3, p.40-60). Johnson was counseled for violating Section 8.2.3 of the City's Personnel Rules & Regulations on October 4, 2005, July 31, 2006, and August 16, 2006. (R.Vol.3, p.5-31). Johnson was clearly aware that her performance was unsatisfactory, having been informed of this many times. She also was given

ample opportunity to, and instruction on, performing her job satisfactorily. Johnson appeared to have the ability to do so, notwithstanding her protestations to the contrary.

After termination on October 27, 2006, Johnson filed for unemployment benefits. The Claims Examiner investigated by interviewing an Employer Representative and Johnson. However, the information obtained from the Employer was incomplete. Thus, based upon information obtained, the Claims Examiner qualified Johnson for benefits. (R Vol.3, p.3).

The City of Clinton appealed the Claims Examiner's findings. Copies of written warnings, a performance evaluation, the Personnel Policy, the termination report and other supporting documents were forwarded to the Mississippi Department of Employment Security [hereinafter "MDES"]. (R.Vol.3, p.4-31).

A hearing was scheduled and held. (R.Vol.3, p.54-156) Johnson participated and testified. The City of Clinton was represented by Robyn Cornelius, Personnel Officer. Ray Holloway, Shane Johnson, and Gisele Champlin testified for Clinton. Afterwards, the Administrative Law Judge [hereinafter "ALJ"] reversed the Claims Examiner's decision; and held that Johnson's unsatisfactory job performance, after numerous warnings, constituted misconduct. (R.Vol.3, p.137-139).

Johnson appealed the decision of the ALJ. (R.Vol.3, p.141). After carefully reviewing the record, the Board of Review affirmed the ALJ's decision, adopting the ALJ's fact findings and opinion. (R.Vol.3, p.160).

The ALJ's Fact Findings and Opinion were as follows, in pertinent part, to-wit:

Findings of Fact:

Based upon the record and testimony, the Administrative Law Judge finds as follows:

> Claimant was employed with the City of Clinton, Mississippi for three years and three months as a receptionist, ending October 27, 2006, when she was discharged.
>
> The employer had gone through a rapid growth period during the past year, which added some job responsibilities on everyone including the claimant. The claimant had some problems remembering how to perform certain tasks from year to year.

In October, 2005, the claimant was issued a warning for insubordination when she failed to follow the instructions of her immediate supervisor.

In July, 2006, the claimant was given an assignment to prepare passes for a softball tournament, but the claimant did not know how to do the passes because she was not very skilled on the computer. This lack of skill and training had not been a problem in previous years. The claimant was issued a written warning for not having the passes completed.

On August 16, 2006, the claimant was issued a warning and suspended for three days-August 17, 18, and 21, for leaving the cash drawer unlocked and unsecured overnight. The supervisor had warned the claimant several times. The claimant was told that the next infraction could result in her termination under the employer's progressive discipline policy.

After the suspension, the claimant filed a grievance with the employer concerning the Director of Parks and Recreation. The claimant felt discriminated against by the Director, and considered his behavior towards her as hostile. The personnel officer investigated the grievance, but found the charged to be unwarranted.

On October 16, 2006, the Director sent the claimant some instructions via e-mail to complete a project involving the printing and mailing out of some 500 letters to the participants in the National Senior Olympic Games. The claimant was told that these needed to be completed by October 25, 2006. The claimant had no idea how to complete the project, and solicited the help of her immediate supervisor. The claimant was able to print the letters and labels.

A second e-mail was sent on October 18, advising the claimant of the deadline. The claimant informed the Director that she still did not understand what needed to be done, so the Director sent an example to the claimant for her to use as a guide on October 23, 2006.

On October 27, 2006, the claimant sent an e-mail to the Director informing him that she had not completed the project, and the claimant was called in and terminated. (Emphasis Added).

Opinion:

Claimant was discharged after she failed to complete a mailing project within the deadline given to her. Although the claimant was unaware of what needed to be done, the claimant did not inform the employer that she had failed to meet the deadline, until two days after the deadline. Since the claimant had been previously warned, and suspended, the claimant was terminated.

It is the opinion of the Administrative Law Judge that the claimant's actions which caused her termination would be considered misconduct connected with the work as that term is defined, and would warrant a disqualification of benefits. Therefore, the decision of the Claims Examiner will be cancelled.

Reversed. Claimant is disqualified.... (Emphasis Added).

(R.Vol.3, p.137-139).

SUMMARY OF THE ARGUMENT

Under the statutes and case law, the Circuit Court, when reviewing the actions of the Mississippi Department of Employment Security in an appeal of an unemployment compensation ruling, is bound by the actions of the MDES and its findings of fact absent fraud or a finding that the correct law has not been applied.

ARGUMENT

The case authorities establish that repeated, grossly negligent poor job performance rises to the level of disqualifying misconduct. See Shavers v. Mississippi Employment Security Commission; 763 So.2d 183 (Miss. COA 2000). (Repeated disregard of job duties after warnings may rise to the level of misconduct.); Kellar v. Mississippi Employment Security Commission; 756 So.2d 840 (Miss. COA 2000)(pattern of errors in job performance and refusal to comply is misconduct); Reeves v. Mississippi Employment Security Commission; 806 So.2d 1178 (Miss. COA 2002)(failure to clean up parts after repeated instructions is misconduct); Johnson v. Mississippi Employment Security Commission; 767 So.2d 1088 (Miss. COA 2000)(postal workers failure to complete route after being instructed to do so is misconduct).

The case authorities establish that intentional or grossly negligent violations of reasonable Employer policies, instructions, and reasonable standards of behavior, constitutes disqualifying misconduct. Mississippi Employment Security Commission vs. Percy, 641 So.2d 1172 (Miss. 1994).

In the instant case, Johnson failed to heed the Employer's warnings regarding the performance of her receptionist job duties. In that regard, Johnson was counseled by Ray Holloway on October 4, 2005, July 31, 2006, and August 16, 2006. She was also suspended for

three days beginning August 16, 2006. Johnson was aware that her conduct was unsatisfactory, but failed to improve. She was also aware that her job was in jeopardy at least as of August 16, 2006, in the event of additional infractions. The tasks assigned were of a relatively simple nature; and in spite of her protestations, Johnson appeared to have the ability to satisfactorily perform these job assignments, which were described by Ray Holloway as Microsoft Word processing. The last incident involved Johnson's failure to make labels, which is a function of Microsoft Word. She apparently represented to Holloway that she was able to use Microsoft Word upon being hired. Nevertheless, efforts were made to show Johnson how to make multiple labels using Microsoft Word. The testimony also indicated that a high school senior completed at least one of the word processing assignments when Johnson failed to do so.

Based upon the overall import of the testimony, it simple appears that Johnson had a mindset that she could not perform this rather elementary word processing; and she spent more time protesting than it would have taken her to complete the assignment.. Since the testimony indicates that Johnson was progressively disciplined, and since the testimony substantially supports the Board of Review's determination that Johnson committed disqualifying misconduct by repeatedly violating the Holloway's instructions regarding reasonable job duties, the Circuit Court should have affirmed the actions of MDES based upon the standard of review on appeal. Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (1992); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

A. Standard of Review

Johnson' appeal to the Circuit Court was governed by Miss. Code Ann. Section 71-5-531 (Rev. 1995), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the **appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied.** (emphasis added). Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (1992);

Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

Further, a rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Security Commission, 639 So.2d 904 (Miss. 1994). The Circuit Court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Further, 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).

B. Application of Facts to the Law

In the instant case, Shane Johnson, the City's Facilities Manager, testified that he had no first hand knowledge about Johnson's termination but that he and Gisele Champlin were present when Ray Holloway terminated Johnson. (R.Vol,3, p.37).

Ray Holloway, Director of Parks and Recreation, stated that Johnson was hired November 1, 2003, as a receptionist and was terminated October 27, 2006, for failure to do her job after repeated warnings. (R.Vol.3, p.40-41).

Regarding the incident leading to her termination, Mr. Holloway stated that he sent Johnson e-mails on October 16 and October 18, 2006, regarding an assignment to enter information into the computer and to prepare 500 labels for letters regarding the upcoming National Olympics. (R.Vol.3, p.42-43). This assignment needed to be completed by October 25th. Mr. Holloway also stated that Johnson was aware of the assignment and the completion date as of October 16, 2006. (R.Vol.3, p.44). Mr. Holloway also stated that on October 23rd, he sent Johnson an example of how to prepare the labels. (R.Vol.3, p.43).

On October 27th, two days after the deadline, Mr. Holloway was notified by Johnson that she had worked on the assignment for days and the labels were not ready. She stated that she did not know how to complete the assignment, and that she needed assistance. (R.Vol.3, p.45). Since Johnson did not notify Mr. Holloway prior to the deadline for completing the assignment, and

since she had failed to perform a similar job assignment, or follow other job related instructions, and since she had been warned that any further failures may result in termination, Mr. Holloway decided to terminate Ms. Johnson as of October 27, 2006.

Mr. Holloway was questioned as to how long it should have taken someone to complete 500 labels. He stated that the assignment could have been completed in one day, even with her other job duties of filing, answering the phone, and generally assisting in the office. (R.Vol.3, p.46-47). Mr. Holloway also commented that Ms. Johnson was not working on any other big projects that would have interfered with completing this assignment. (R.Vol.3, p.47).

Regarding prior incidents, Mr. Holloway testified that on October 4, 2005, Johnson was given a written warning for insubordination. (R.Vol.3, p.48-49). On that occasion, she was instructed not to lock a filing cabinet while out for lunch, but she did so anyway. Mr. Holloway said the filing cabinet contained information that needed to be accessed by other employees for customer service during the lunch hour. (R.Vol.3, p.49).

On July 31, 2006, Johnson had received a written warning for failing to follow job responsibilities. Johnson was given an assignment to prepare tickets for a national softball tournament. She was given two months to complete this assignment. (R.Vol.3, p.50). Preparation of these tickets was similar to preparation of the labels that she had been asked to prepare in October of 2006. Mr. Holloway also stated that he found out that she had not completed this assignment two hours before the deadline. (R.Vol.3, p.46).

On October 16, 2006, Johnson was written up for failing to lock up the cash drawer on two occasions. Ms. Johnson was suspended for three days; and was told that her job may be in jeopardy if another write up occurred. (R.Vol.3, p51-52). A copy of this warning was submitted to the MDES with documents accompanying the City's appeal from the Claims Examiner's decision. (R.Vol.3, p.4, 18-19).

Mr. Holloway was questioned about the City's disciplinary policy. He stated that employees received and signed for a handbook. The Personnel Officer also informed them of the

policy. (R.Vol.3, p.52-53). A copy of this policy was also submitted to the MDES along with the City's appeal from the Claims Examiner's decision. (R.Vol.3, p.12-14).

Mr. Holloway was also questioned as to whether Johnson understood that discharge was possible due to another infraction after the October 16th incident, to which he replied that he thought she did understand. (R.Vol.3, p.53-54). Mr. Holloway was also questioned as to Johnson's job duties. He stated that there were occasions when she performed her job satisfactorily. (R.Vol.3, p.54). He also commented that the City recently experienced rapid growth requiring that Johnson accept additional job responsibilities. (R.Vol.3. p.54-55). He stated that she had been repeatedly shown how to perform certain job duties, but she seemed to not remember for any length of time. (R.vol.3, p.55-56). He also commented that she had gotten a poor yearly evaluation. (R.Vol.3, p.57). A portion of that evaluation was forwarded to the MDES. (R.Vol3,p.20-27).

Linda Johnson testified next. Johnson stated that she began work on July 21, 2003, and was terminated on October 27, 2006, by Ray Holloway for things occurring between July 17, 2006, and October 27, 2006. (Rvol.3, p.61).

Regarding the incident leading to her termination, Johnson stated that Mr. Holloway's secretary had a database for the Senior Olympics; and Mr. Holloway sent her an e-mail telling her that the attached letter needed to go out, and that she needed to prepare 500 labels. (R.Vol.3.p.63-64). Johnson said she only knew how to do one label at a time. (R.Vol.3,p.66). She did not know how to prepare multiple labels, but Gisele Chapan had tried to show her. However, Johnson also stated that she had prepared letters that were unacceptable. (R.Vol.3,p.64-65).

Regarding the incident leading to her suspension on August 16, 2006, Johnson acknowledged that the cash drawer was left open on August 14th, but she claimed that Gisele Champlin was actually responsible for signing off on it that night. (R.Vol.3,p.68). Johnson acknowledged that she as suspended for three days as a result of this incident. (R.Vol.3,p.68-69).

Johnson was also questioned about an incident occurring regarding preparation of tickets for a softball tournament. She stated that a few days before the suspension, around July 28, 2006,

Mr. Holloway came to her and gave her directions to prepare passes or tickets. She stated that she was unable to do that, because she was not sure what they were to look like. She was then out sick for one day. When she returned, the tickets and passes had been completed by a high school senior. Mr. Holloway wrote her up as a result of this incident. (R.Vol 3,p.70-71).

Johnson was questioned about her ability to do her job. She stated that she could do her job when not given work out of the ordinary. She also stated that she did not have the computer skills to complete the labeling and ticket preparation assignments. (R.Vol3,p.71-72). She claimed that she had requested computer training from the City; and that she tried to take a junior college computer course, but she was unable to complete the class due to her work schedule. Johnson acknowledged that she was told on July 31, 2006, that if her work didn't improve, termination may result. She also stated that she was aware of the City's progressive discipline policy. (R.Vol.3,p.72-73).

Johnson was questioned about the warning for insubordination in October of 2005. She stated that she agreed with it, but she had to lock the filing cabinet, because she had to place her purse in the filing cabinet while out for lunch, and her purse contained a large sum of cash. (R.Vol.3,p.73). She stated that she did not want to take her purse to lunch; and she was afraid to leave the key, even though it would have been left with her supervisor. (R.Vol.3,p.78).

Johnson also commented that she had filed a grievance on October 14, 2006, against Mr. Holloway claiming that he had discriminated against her due to her age. A Personnel Officer investigated, but found the complaint unwarranted. She commented that this was a "usual" response; and she believed that this grievance sped up her termination. (R.Vol.3p.73-75).

Johnson was questioned as to the performance evaluation. She acknowledged that she received a poor evaluation; and claimed that Mr. Holloway wanted to let her go, because she was not young, pretty, or cool. (R.Vol.3,p.80). (Johnson did not explain why Holloway had hired her only a short time early when she would not have been younger, prettier, or cooler.)

On cross-examination, she was questioned regarding the grievance. She acknowledged that she did not deliver the grievance to the Personnel Officer as required, but to the Mayor's

secretary. She also acknowledged that she was not aware of the extent of the investigation. (R.Vol3,p.82-88).

Ms. Cornelius, the Employer's representative, again questioned Ray Holloway. (R.Vol.3,p.96). First, Ms. Cornelius questioned Mr. Holloway about the incident in which Johnson was warned and written up for leaving the cash drawer unlocked. (R.Vol.3,p.96-99). The ALJ also questioned Mr. Holloway as to whether Johnson had requested computer training classes. He stated that it was only after the fact. (R.Vol.3,p.100).

Mr. Holloway also stated that he was expecting Johnson to keep him informed about the progress of the labeling job, because Gisele Champlin had other job duties. (R.Vol.3,p.103). Mr. Holloway also stated that the computer problems were remedied, apparently prior to the final occurrence. (R.Vol.3,p.103-104). Mr. Holloway was also questioned about the grievance that Johnson filed. He stated that he was not aware of the details, but he was disappointed over the fact that she had filed it. He did not get "furious", hostile or angry. He also denied wanting to get rid of Johnson. (R.Vol.3,p.106-107) or that Johnson had informed him that she did not have basic computer skills when he hired her. (R.Vol.3,p.108). He stated that the computer requirements were basic Microsoft Word. He also commented that her computer skills appeared adequate during her employment. (R.Vol3,p.108-109).

Gisele Champlin testified for the City. (R.Vol.3,p.126-127). Champlin stated that she believed the final straw was Johnson's failure to get the Senior Olympics letters out. Champlin stated that Johnson had two weeks to complete the assignment; and she did not let anyone know she had not completed the assignment until the final Friday. (R.vol.3,p.127). Champlin was also questioned as to whether Johnson asked her for assistance, to which she replied that she did ask and receive assistance. Champlin also stated that a new computer had been obtained, that it was working fine, and that she was able to print sheets of labels. (R.Vol.3,p.128). She also showed Johnson how to do it. (R.Vol.3,p.128). On further examination, Champlin stated that Mr. Holloway instructed her to show Johnson how to do the mass mailing on labels, and answer questions, which she did. (R.Vol.3,p.132).

Regarding the incident with leaving the cash drawer open, Champlin stated that after being written up, Johnson was required to bring the cash drawer to her each day to sign-off on. (R.Vol.3,p.128). Champlin actually wrote Johnson up when she found the cash drawer unlocked over night; and required that she check the cash drawer after that incident. Champlin had previously verbally warned Johnson regarding Johnson's failure to follow the instructions and procedures. (R.Vol.3,p.129).

The instant case is akin to the misconduct line of cases involving a grossly negligent, or willful and wanton, and substantial or serious disregard of an employee's job duties, and the employer's interest. In these cases, the behavior causing termination is within the capacity and control of the employee, is a serious disregard of work-related duties, and constitutes misconduct. See Mississippi Employment Security Commission v. Percy, 641 So.2d 1172 (Miss. 1994) (a nurse was terminated for violating the employer's policy requiring that she appropriately complete time sheets); Sojourner v. Mississippi Employment Sec Common, 744 So. 2d 796 (Miss.Ct.App. 1999) (security guard's failure to follow policy prohibiting remaining on property after shift hours constituted misconduct) Hux v. Mississippi Employment Sec. Comm'n 749 So. 2d 1223 (Miss Ct. of App. 1999)(factory worker's failure to follow management's directives not to have contact with a co-employee held misconduct); Young v. Mississippi Employment Security Comm'n, 754 So. 2d 464 (Miss.1999)(employee's refusal to turn in her employee identification badge during a suspension constituted insubordination); Halbert v. City of Columbus, 722 So. 2d 522 (Miss. 1998)(an employee's refusal to submit to a random drug test constituted insubordination); Shavers v. Mississippi Employment Security Commission; 763 So.2d 183 (Miss. COA 2000) (Repeated disregard of job duties after warnings may rise to the level of misconduct.); Kellar v. Mississippi Employment Security Commission; 756 So.2d 840 (Miss. COA 2000)(pattern of errors in job performance and refusal to comply with instructions is misconduct); Reeves v. Mississippi Employment Security Commission; 806 So.2d 1178 (Miss. COA 2002)(failure to clean up parts after repeated instructions is misconduct); Johnson v. Mississippi Employment Security Commission; 767 So.2d 1088 (Miss. COA 2000)(postal

workers failure to complete route after being instructed to do so is misconduct); Claiborne v. Mississippi Employment Security Comm'n, 872 So. 2d 698 (Miss. Ct. of App. 2004)(prolonged and persistent failure to perform routine duties, especially after repeated warnings, constitutes misconduct); Mississippi Employment Security Comm'm v. Barnes, 853 So. 2d 153 (Miss. COA 2003)(paint mixer's violation of a safety rule rose to the level of misconduct).

C. Ruling by the Circuit Court

After considering the motions, briefs and arguments of the parties, the Circuit Court of Hinds County entered its Order Reversing Mississippi Department of Employment Security Commission's Decision on September 14, 2007. (R.p 161) In that decision the Circuit Court found that the "undisputed facts" did not establish "disqualifying misconduct" and reversed the findings and decision of the Board of Review.

However, Section 71-5-531 requires the Circuit Court to accept the record from the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence and if the correct law has been applied. (Emphasis added). Here the Circuit Court made no finding of fraud and then substituted its own view of the facts contrary to the findings of the Board of Review. The order refers to a lack of substantial evidence but does not provide any findings of fact on this issue. The Appellants herein respectfully submit that the Circuit Court erred in failing to uphold the decision of the Board of Review.

CONCLUSION

The record below clearly established the relevant incidents in this case, all of which lead to Claimant's termination. These facts constitute substantial evidence supporting the Board of Review's finding of misconduct. The Board of Review who justified in finding that Johnson did what was alleged, and that her continued failure to complete her duties and assignments, after numerous warnings, constituted misconduct, pursuant to Employer standards of behavior, and Mississippi Unemployment Compensation Law. The Circuit Court should have accepted the Board's Findings of Fact, absent fraud, and where the facts supported the Board's conclusion.

The Appellants respectfully request that the actions of the Circuit Court be reversed and a decision rendered in compliance with the findings of the Board of Review.

Respectfully submitted, this the 10th day of June, 2008.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY COMMISSION
and CITY OF CLINTON

BY: KENNETH R. DREHER, P.A.

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* * * * * * * * *

CERTIFICATE OF SERVICE

I, Kenneth R. Dreher, one of the Attorneys for Appellants, Mississippi Department of Employment Security Commission and City of Clinton, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant, City of Clinton to the following:

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Honorable W. Swan Yerger
Circuit Court Judge
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Jackson, MS 39205-0327

This the 18th day of June 2008.

Kenneth R. Dreher