IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CC-02142

MARGIE BROWN — **PLAINTIFF/APPELLANT**

VS.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND WAL-MART ASSOCIATES, INC. — **DEFENDANT/APPELLEES**

BRIEF OF THE APPELLEE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, "MDES", Defendant-Appellee
2. Wal-Mart Associates, Inc., Defendant-Appellee
3. Margie Brown, Plaintiff-Appellant
4. LeAnne F. Brady, Attorney for Defendant-Appellee
5. Ray Charles Evans, Attorney for Plaintiff-Appellant
6. Hon. Vernon R. Cotten, Circuit Court Judge of Newton County.

This the 15th day of September, 2009.

LeAnne F. Brady

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BRIEF OF DEFENDANT/APPELLEE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

STATEMENT OF THE ISSUES

1. Whether the Board of Review's decision should be affirmed, finding that the Employer, Wal-Mart Associates, Inc., proved by substantial evidence that the Claimant, Margie Brown, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A(1)(b)(2008).
2. Whether the Employer's appeal to the Administrative Law Judge of the Notice to Employer of Claims Determination was timely.

STATEMENT OF THE CASE

Margie Brown [also hereafter referred to as "Claimant"] was employed for approximately four years as an overnight stocker with Wal-Mart in Newton, Mississippi [also hereafter referred to as "Employer"], until she was discharged on approximately May 9, 2008. (R. Vol. 1, p. 1, 29).

Subsequently, the Claimant filed for unemployment benefits and an investigation was conducted by MDES to determine the Claimant's eligibility for unemployment benefits. (R. Vol. 1, p. 10-16). After an investigation of the facts and circumstances surrounding the case, the Claims Examiner found that the Employer had not proved the Claimant had committed

disqualifying misconduct connected with work. (R. Vol. 17, p. 5). The Employer filed a Notice of Appeal of this decision on June 20, 2008. (R. Vol. 1, p. 19).

A telephonic hearing before the Administrative Law Judge [also hereafter referred to as "ALJ"] was scheduled for July 21, 2008. (R. Vol. 2, p. 22). Participating in the hearing was the Claimant, an Employer representative and witness. (R. Vol. 1, p. 27-80). On July 23, 2008, the ALJ issued his decision finding that the Claimant had committed disqualifying misconduct for violating the Employers break and meal policy. (R. Vol. 1, p. 128-129). On July 24, 2008, the Claimant filed an appeal to the Board of Review. (R. Vol. 1, p. 131). The Board of Review affirmed the ALJ's Findings of Fact and Decision as follows, to wit:

FINDINGS OF FACT

The claimant worked for Wal Mart, Newton, Mississippi for four years as an overnight stocker, ending May 9, 2008, when she was discharged.

The claimant was aware of the employer's policies and procedures concerning attendance, and break times, as well as productivity. In December 2007, the claimant was verbally counseled about taking extended breaks. The claimant was allowed two paid fifteen minute breaks during her shift, but was observed abusing that by taking a twenty-five minute break.

In January 2008, the claimant was warned about productivity. The claimant had fifty-seven cases to unpack and stock which she should have completed by 11:45, but at 3:15, the claimant still had thirty-seven cases left.

In February 2008, the claimant was issued a decision making day or final warning, for having six unexcused absences during the past six months.

On May 5, 2008, the claimant was observed taking a twenty-three minute break, and then a twenty-eight minute break during her allotted fifteen minute break time. The violation was reported to the manager, and the claimant was terminated on May 9, 2008.

REASONING AND CONCLUSION

Section 71-5-513A(1)(b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he has earned remuneration for personal services equal to not less

than eight times his weekly benefit amount as determined in each case. Section 71-5-513A(1)(c) provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.

Section 71-5-355 of the Mississippi Employment Security Law provides, in part, that an employer's experience rating record shall be chargeable with benefits paid to a claimant, provided that an employer's experience rating record shall not be chargeable if the Department finds that the claimant left work voluntarily without good cause connected with the work, was discharged for misconduct connected with the work, or refused an offer of available, suitable work with the employer.

Mississippi Employment Security Regulation 308.00 provides that a claimant will not be found guilty of misconduct for violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonable related to the job environment and job performance; and (3) the rule is fairly and consistently enforced.

The employer discharged the claimant for violating the break and meal policy. Since the claimant had three prior warnings, one of which was for violating the break and meal policy, when the claimant took two extended breaks during the same shift, the claimant was terminated.

It is found that the actions which caused the claimant's termination would be considered misconduct connected with the work as that term is defined, and would warrant a disqualification of benefits and afford the employer to a non-charge. Therefore, the decision of the Claims Examiner will be cancelled.

DECISION

Reversed. The claimant is disqualified from receiving unemployment insurance benefits from May 10, 2008, and until she has become reemployed and earned eight times her weekly benefit amount in covered employment.

(R. Vol. 1, p. 128-129).

The Claimant timely filed her appeal to the Circuit Court of Newton County on September 3, 2009. (R. Vol. 1, p. 2). Briefs were not filed in the lower court by either party. The Honorable Vernon R. Cotton issued his decision on November 24, 2008, affirming the decision of the Board of Review. (R. Vol. 1, p. 146-147). The Claimant then perfected her appeal to this Honorable Court. (R. Vol. 2, p. 166).

SUMMARY OF THE ARGUMENT

The applicable statute in this case, Mississippi Code Annotated Section, 71-5-513(A)(1)(b)(2008), provides for disqualifying persons from benefits otherwise eligible, if they have committed acts of misconduct on the job. The primary issue in this case concerns whether the Board of Review's decision should be affirmed, finding that the Employer, Wal-Mart Associates, Inc., proved by substantial evidence that the Claimant, Margie Brown, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(2008).

In the present case, the Claimant was aware of the Employer's policies regarding attendance, breaks, and productivity. The Claimant was verbally counseled about taking extended breaks, was warned about productivity, and had six unexcused absences in a six (6) month period. She was given a "decision day" or final warning for the unexcused absences. When the Claimant was again observed taking extending breaks after her "decision day" she was terminated. The Claimant repeatedly failed to follow the Employer's policies and procedures which ultimately resulted in her termination.

Thus, it is the contention of MDES that the testimony and evidence presented in this case before the ALJ was sufficient and substantial and proved that the Claimant's actions constituted disqualifying misconduct under the Mississippi Employment Security Law. Therefore, this Honorable Court should affirm the decision of the Board of Review.

It is also the contention of MDES that the appeal filed by Employer was timely filed in accordance with department practice.

ARGUMENT

I. *Standard of Review*

The provisions of Mississippi Code Annotated Section 71-5-531 govern this appeal. That Section states that the appeals court shall consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. Richardson v. Miss. Emp. Sec. Comm'n, 593 So. 2d 31, 34 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n, 583 So. 2d 193, 195 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381, 1384 (Miss. 1982).

In Barnett, the Mississippi Supreme Court held 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, a rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Miss. Emp. Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994). The appeals court also must not reweigh the facts nor insert its judgment for that of the agency. McLaurin v. Miss. Emp. Sec. Comm'n, 435 So. 2d 1170, 1172 (Miss. 1983).

II. *The Board of Review's decision should be affirmed, finding that the Employer, Wal-Mart Associates, Inc., proved by substantial evidence that the Claimant, Margie Brown, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A (1)(b).*

Mississippi Code Annotated Section 71-5-513 provides for disqualifying persons from benefits otherwise eligible for acts of misconduct connected with their work. The term misconduct as used in the Mississippi Employment Security Law is defined as an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a

disregard of the standard of behavior which an employer has the right to expect from an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer. Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982). Likewise, repeated negligence of the Employer's interest may also show a pattern of misconduct on the part of the claimant. Miss. Emp. Sec. Comm'n v. Jones, 755 So. 2d 1259, ¶10 (Miss. Ct. App. 2000). Mississippi Code Annotated Section 71-5-513 provides that the Employer has the burden of proof to show misconduct on the part of the Claimant.

While the Claimant only argues that the Employer's appeal was not timely filed and does not present any argument regarding her denial of benefits, the Circuit Court considered this issue when making its ruling; therefore, MDES will briefly address whether or not the Board of Reviews decision was supported by substantial evidence. Substantial evidence can be found in the record to support the decision of the Board of Review that the claimant committed disqualifying misconduct. The Claimant's behavior leading to the terminating event clearly exhibits a wanton or willful disregard for the Employer's interests. Her repeated violations of the company's policies further indicate an intentional disregard of her duties and obligations to the Employer. According to the testimony of Employer's representative, Mr. Clint Sampson, Ms. Brown was given a verbal warning for taking excessive breaks in December of 2007. (R. Vol. 1, p. 47). In January of 2008, Ms. Brown was given a verbal warning for grossly understocking during her shift. (R. Vol. 1, p. 48). Ms. Brown was given a decision making day or final warning for unapproved absences. (R. Vol. 1, p. 48-49). The Claimant was terminated when she was observed on videotape taking two (2) excessive breaks in the same day in May of 2008. (R. Vol. 1, p. 55).

This was supported by the employer's witness, John Reed, the Asset Protection Coordinator. Mr. Reed testified that he observed the videotape in which a group of employees,

including Ms. Brown, were seen taking excessive breaks twice during their shifts on May 5, 2008. (R. Vol. 1, p. 70). Mr. Reed testified that all the employees from the video were discipline for the incident and Ms. Brown was terminated. (R. Vol. 1, p. 70-71). Mr. Reed also testified that he knew Ms. Brown was counseled for taking excessive breaks previously in December of 2007. (R. Vol. 1, p. 71). The Employer also submitted documentation into evidence showing the Employer's policies and Ms. Brown's disciplinary actions. (R. Vol. 1, p. 96 to 111).

Ms. Brown testified that she was aware of the company's policies and procedures. (R. Vol. 1, p. 76). She admitted that she was counseled about productivity in January of 2008. (R. Vol. 1, p. 81). Ms. Brown could offer no explanation of why the videotape showed her taking excessive breaks, but testified that she did not take excessive breaks. (R. Vol. 1, p. 89-90).

Given the overwhelming amount of first hand testimony and evidence presented by the Employer, it is clear that the Claimant's repeated, documented warnings demonstrate a negligent pattern of behavior towards the Employer's interests. This Honorable Court should affirm the decision of the Board of Review.

III. *The Employer's appeal of the Notice to Employer of Claims Determination was timely.*

The timeframe for filing an appeal to the Administrative Law Judge can be found at Mississippi Code Annotated Section 71-5-517. This section states in part that the "claimant or any party to the initial determination or amended initial determination may file an appeal from such initial determination or amended initial determination within fourteen (14) days after notification thereof, or after the date such notification was sent to his last known address." The Claimant argues that the appeal filed by the Employer of the Notice to Employer of Claims Determination was untimely because it was not stamped filed by the MDES appeals department on or before the fourteenth (14th) day of the statutory deadline, which would have been June 20,

2008. However, the Employer's appeal was postmarked on June 20, 2008. (See Envelope attached as Exhibit A). It is the standard business practice of MDES to look to the postmark date in determining the timeliness of an appeal. Even though the Appeals Department did not stamp it received until June 25, 2008, the envelope clearly shows that the appeal was mailed by June 20, 2008.

A. The Claimant waived her right to argue the issue of the timeliness of the Employer's appeal from the Notice to Employer of Claims Determination when she failed to assert this claim before the Administrative Law Judge or the Board of Review.

MDES asserts that the Claimant has waived her right to argue this issue since she failed to assert it before the ALJ, the Board of Review, or the circuit court. In fact, the Claimant's brief before this Honorable Court is the first time the issue has been raised. This Court has "repeatedly held that an issue not raised before the lower court is deemed waived and is procedurally barred." Public Employee's Retirement System v. Freeman, 868 So. 2d 327 (Miss. 2004); (*citing* Davis v. State, 684 So.2d 643, 658 (Miss. 1996); Cole v. State, 525 So.2d 365, 369 (Miss. 1987). MDES asserts that since the Claimant failed to argue this issue before the ALJ, Board of Review, or circuit court, it is procedurally barred and cannot be considered now by this Honorable Court.

B. MDES's policy of considering an appeal to the ALJ or Board of Review timely filed if it is postmarked by the statutory deadline is reasonable, applied equitably, is not arbitrary and therefore, the Employer's appeal should be considered timely filed.

Even if this Court finds the Claimant has not waived this issue, MDES asserts that the Employer's appeal was timely filed. The Claimant cites to two cases, Wilkerson v. Miss. Emp. Sec. Comm'n, 630 So. 2d 1000 (Miss. 1994), and Mississippi Emp. Sec. Comm'n. v. Parker, 903 So. 2d 42 (Miss. Ct. App. 2005), as its main authorities to support its position. MDES concedes that while Wilkerson and Parker interpret the statute in question, both cases are distinguishable

from the case at hand. In Wilkerson, the Claimant argued before the ALJ, the Board of Review and the Warren County Circuit Court that the Employer had failed to timely file its appeal.[1] Wilkerson, 630 So. 2d at 1000. The circuit court remanded the case back to the Board of Review for findings on the issue of timeliness. Id. The Board of Review determined that the employer's appeal was timely filed because, "[a]t the time the employer filed this appeal the Board of Review was allowing an additional mailing time of three days and had instructed Referees[2] to accept appeals filed within seventeen days of the date of mailing of notification by the Claim Examiner as being timely filed." Id.

The claimant again appealed to the circuit court on the issue of timeliness, and the circuit court affirmed. The claimant appealed to the Mississippi Supreme Court which found that:

> Mississippi Unemployment Compensation statutory scheme does not contain a provision which gives the Commission the power to modify the statute by arbitrarily or capriciously adding three days to the time for appeal. Since the statute is clear and unambiguous, no room exists for judicial construction, and the courts are obligated to apply the clear meaning of the statute.

Id. at 1002.

Parker, likewise, concerned the three (3) day mail rule under Rule 6(e) of the Mississippi Rules of Civil Procedure. In Parker, the Board of Review ruled the Claimant had not timely filed her appeal from the ALJ's decision. Parker, 903 So. 2d at 43 (¶2). The circuit court reversed and found that under Rule 6(e) of the Mississippi Rules of Civil Procedure, Ms. Parker was allowed three (3) additional days to file her appeal; therefore, her appeal to the Board was timely. Id. MDES appealed to the Mississippi Supreme Court and the Court of Appeals affirmed the decision of the circuit court. Id. at 45 (¶10). On Writ of Certiorari filed by MDES, the

[1] MDES would like the Court to note that the Claimant in Wilkerson asserted that the Employer had not timely filed their appeal at every appellate level, which is not the case in the matter currently before the Court. MDES again asserts that Ms. Brown waived her right to argue this issue when she did not present this argument to the ALJ, Board of Review, or the Circuit Court.

[2] At this time, Administrative Law Judges were referred to as "Appeals Referees."

Mississippi Supreme Court reversed, finding that the Mississippi Rules of Civil Procedure do not apply to administrative hearings and that the statute should be strictly construed and that Parker's appeal to the Board of Review was not timely filed. Id. at 45 (¶12).

Since the case of Wilkerson, MDES did away with allowing parties to an appeal an additional three (3) days for mailing the notice of appeal. As such, the legal analysis in Parker is also distinguishable from the case at bar. Instead, MDES instituted a policy that it would consider an appeal timely filed if it was postmarked by the fourteenth (14th) day. There are four (4) main reasons for this. The first is that the statute makes it clear that the parties fourteen (14) day deadline begins to run from the date the decision is MAILED from MDES. If the parties are bound by the mail date and not the receipt date to calculate the fourteen (14) day time period, it is only equitable that the parties be allowed to mail their appeal on the fourteenth (14th) day.

Secondly, MDES receives approximately 4000 to 5000 pieces of mail at its state office a day. The mail does not always get sorted to the appropriate department on the day it is received. It may take several days for the appeals department to receive a notice of appeal. Due to this problem, the support staff in appeals must look to the postmark on the envelope to determine if a notice of appeal was filed timely.

Thirdly, of the 4000 to 5000 pieces of daily mail received at the MDES state office, approximately 70 to 100 pieces are addressed to the appeals department. This mail must be opened and sorted by support staff. While staff strives to open every piece of mail each day, this simply is not always possible. Therefore, staff must look to the postmark to determine if something was filed timely. If the notice of appeal is postmarked to MDES on or before the fourteenth (14th) day, then the appeal is considered timely filed.

Finally, MDES instituted the postmark policy due to inconsistencies with the mail. It is feasible that a party could mail a notice of appeal to MDES three (3) days prior to the statutory

deadline and it still be received after the fourteenth (14th) day. MDES does not believe a party should be procedurally barred due to an issue with the mail. Of course, an argument could be made that an individual could overnight the letter to insure that it reached MDES by the deadline; however, overnight postage is expensive. In many cases, the party appealing is an unemployed, *pro se* claimant. MDES asserts that it is not equitable to expect these individuals to have the resources available to pay for overnight mail. It is a fair and equitable policy to accept a notice of appeal as timely filed if it is postmarked by the statutory deadline.

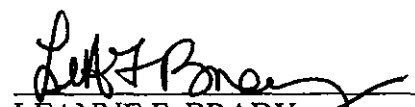
MDES fairly administers this policy to both claimants and employers in appeals to the ALJ and the Board of Review. Unlike the three (3) day rule in Wilkerson and Parker, it is not arbitrary nor does it have an ad hoc or sporadic application. It is a reasonable policy created to ensure that all interested parties' rights are preserved when they file an appeal to the ALJ or Board of Review via the mail. MDES asserts that the Employer's appeal was timely filed and this Court should affirm the decision of the Board of Review.

CONCLUSION

The Claimant has waived her right to question the timeliness of the Employer's appeal since she failed to raise it before the ALJ, Board of Review or the circuit court. The Employer's appeal was timely and MDES's policy that an appeal is timely if it is postmarked by the statutory deadline is reasonable and fair. There is substantial evidence to support the findings of fact and the opinion of the Board that the Claimant did commit misconduct, and should be, and in fact, is disqualified from receiving unemployment benefits under the Mississippi Employment Security Law. Thus, this Honorable Court should affirm the decision of the Board of Review in this matter.

RESPECTFULLY SUBMITTED this the 15th day of September, 2009.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY



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CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to:

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This the 15th day of September, 2009.

Respectfully Submitted,

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Appeals

Exhibit A