IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2009-CC-00358

YAMENIA WILSON — PLAINTIFF/APPELLANT

VS.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND WALMART #2717 — DEFENDANT/APPELLEES

BRIEF OF THE APPELLEE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

ORAL ARGUMENT NOT REQUESTED

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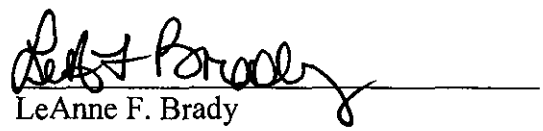
CERTIFICATE OF INTERESTED PARTIES

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 #2717, Defendant-Appellee
3. Yamenia Wilson, Plaintiff-Appellant
4. LeAnne F. Brady, Attorney for Defendant-Appellee
5. Glenda F. Funchess, Attorney for Plaintiff-Appellant
6. Hon. Robert B. Helfrich, Circuit Court Judge of Forrest County.

This the 15th day of September, 2009.



LeAnne F. Brady

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
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YAMENIA WILSON **PLAINTIFF/APPELLANT**

VS.

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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 #2717, proved by substantial evidence that the Claimant, Yamenia Wilson, 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

Yamenia Wilson [also hereafter referred to as "Claimant"] was employed for approximately one year and eight months as a people greeter with Wal-Mart #2717 [also hereafter referred to as "Employer"], until she was discharged on approximately May 31, 2007. (R. Vol. 2, p. 1).

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. 2, p. 3). 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. 2, p. 5). The Employer filed a Notice of Appeal of this decision on June 28, 2007. (R. Vol. 2, p. 6).

A telephonic hearing before the Administrative Law Judge [also hereafter referred to as "ALJ"] was scheduled for August 8, 2007. (R. Vol. 2, p. 7). On August 8, 2007, the ALJ attempted to contact Ms. Wilson and was unable to reach her or her representative, Ms. Virginia Hales Brown; therefore the Claimant failed to participate in the hearing. (R. Vol. 2, p. 9). An Employer representative, Ms. Salenta Vaughn, did appear and the ALJ took her testimony. (R. Vol. 2, p. 9-19). After the hearing but prior to the ALJ's decision, the Claimant requested a rehearing. (R. Vol. 2, p. 24). On August 8, 2007, the ALJ issued his decision finding that the Claimant had committed disqualifying misconduct for failure to adhere to the practices of Wal-Mart #2717. (R. Vol. 2, p. 22). On August 20, 2008, the Claimant filed a formal request with the Board of Review for reconsideration. (R. Vol. 2, p. 26-27). The Board of Review affirmed the ALJ's Findings of Fact and Decision as follows, to wit:

> **FINDINGS OF FACT**
>
> Based upon the record and testimony, the Administrative Judge finds as follows:
>
> The Claimant was employed for approximately one year and eight months last working as a people greeter with Wal-Mart #2717, Hattiesburg, Mississippi, ending on June 1, 2007. The claimant was discharged this day in accordance with the employer's progressive discipline policy.
>
> The employer's policy states that the first step in the disciplinary process is a verbal warning. The second step is a written warning and the third step is a decision making day. A decision making day is a day off with pay in order for the employee to write a plan of action to correct a problem. The employer's policy states that if the employer experiences any problems with the employee within one year for the decision making day, the employee will be discharged. The claimant was aware of the employer's policy.
>
> The employer does not have documentation of the verbal warning. On March, 29, 2006, the claimant was issued a written warning due to a cash overage.
>
> On January 17, 2007, the claimant left her assigned work area to answer the telephone. The caller made a bomb threat. This was reported to management,

and the claimant was instructed not to tell anyone about the bomb threat. The employer discovered that the claimant did tell coworkers and customers of the bomb threat. The claimant was issued a decision making day as a result of this incident.

The final incident occurred on June 1, 2007, when the assistant manager observed the claimant talking to a customer for approximately ten minutes. The assistant manager had previously advised the claimant that she was not allowed to engage in conversations with the customers.

REASONING AND CONCLUSION

Section 71-5-513A(1)(b) of the 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.

In the Mississippi Supreme Court, in the case of Wheeler vs. Arriola, 408 So. 2d 1387 (Miss. 1982), the court held that:

"The meaning of the term 'misconduct', as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent, or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertencies and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute."

The claimant was discharged in accordance with the employer's disciplinary policy after she was observed engaging in a conversation with a customer. The claimant was aware that this practice was prohibited, and her failure to refrain from this practice does show misconduct as that term is defined. Therefore, the decision of the Claims Examiner will be cancelled."

(R. Vol. 2, p. 21-22).

The Claimant timely filed her appeal to the Circuit Court of Forrest County on October 10, 2007. (R. Vol. 1, p. 6). After considering the briefs filed by both parties, the Honorable Robert B. Helfrich issued his decision on January 26, 2009, affirming the

decision of the Board of Review. (R. Vol. 1, p. 90). The Claimant then perfected her appeal to this Honorable Court. (R. Vol. 1, p. 95).

SUMMARY OF THE ARGUMENT

The applicable statute in this case, Mississippi Code Annotated Section, 71-5-513(A)(1)(b), 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 #2717, proved by substantial evidence that the Claimant, Yamenia Wilson committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A(1)(b)(Supp. 2008).

In the present case, the Claimant was given at least two written warnings and one "decision day" prior to termination. The Claimant repeatedly failed to follow instructions to watch the door, greet people, and refrain from holding conversations with friends.

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 #2717, proved by substantial evidence that the Claimant, Yamenia Wilson, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A (1)(b)(Supp. 2008).*

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.

Ms. Wilson failed to participate in the hearing before the ALJ. From the record, it is clear that the ALJ attempted to contact Ms. Wilson and her representative at the number they provided and received no answer. (R. Vol. 2, p. 9). The Claimant asked for rehearing, asserting that she and her representative were available for the hearing; however, the phone call was forwarded to the wrong extension. (R. Vol. 2, p. 24). The Notice of Hearing provides that a party, "must provide the correct information including the contact person's name and the telephone number where you can be reached." (R. Vol. 2, p. 7). The ALJ clearly called the number the Claimant provided and the call was not received due to some miscommunication within the office of the Claimant's representative. It is not the responsibility of MDES to ensure that the phone call is forwarded to the correct extension. The Claimant should have made the proper arrangements to receive the call.

Moreover, pursuant to its rule-making authority, MDES has adopted Appeals Regulations 200.05, 208.00 and 209.00 which address failure to timely appear at a hearing. Miss. Code Ann. § 71-5-525 (2008). (*See* (R. Vol. 1, p. 68-71)). Regulation 200.05 provides that when a party fails to appear, MDES has the discretion to refuse to re-open a hearing. This also provides that

failure to appear is a default or abandonment of the appeal; and a default ruling may be entered. Thus, the issue regarding the Claimant's default is within MDES's authority to determine under Mississippi Code Annotated Sections 71-5-523 and 71-5-525 (Miss. 2008), and the regulation making authority of the Department. MDES asserts that due to the Claimant's failure to participate in the hearing, she is barred from complaining about the ALJ's decision finding for the Employer.

Moreover, the Employer met its burden of proof by submitting substantial evidence 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 negligence further indicates an intentional disregard of her duties and obligations to the Employer. According to the testimony of the Employer's representative, Ms. Salenta Vaughn, Ms. Wilson had been given multiple verbal warnings about her work performance by different supervisors over the course of her employment. (R. Vol. 2, p. 18). These warnings were followed by a written warning about her negligence in cash shortages and overages on March 29, 2006. (R. Vol. 2, p. 12). The third step was another written warning on January 17, 2007, for her deliberate violation of Employer's instruction not to leave the door to answer the lobby telephone. Once she did answer the telephone, she deliberately ignored the further instructions not to divulge that conversation. This improper conduct resulted in a "decision day," which gives the employee an opportunity to reflect on the behavior and draft a statement showing a plan to correct that behavior. Apparently Ms. Wilson did not turn in her statement. (R. Vol. 2, p. 14-15). A "decision day" puts the employee on notice that one more violation within the year will result in termination. (R. Vol. 2, p. 15).

On or about May 31, 2007, Ms. Wilson was terminated because she blatantly ignored her supervisor's directives to watch the door, greet people, and refrain from holding extensive

conversations with customers. (R. Vol. 2, p. 17). This was a violation of the duties of her position and it occurred within a year of her "decision day."

The Claimant's argument that the ALJ and Board of Review's decision are not supported by substantial evidence is unpersuasive considering the testimony presented at the hearing before the ALJ. Moreover, the Claimant can hardly complain about the weight of the evidence when she did not participate in the hearing. The Claimant basis her argument on two cases: Williams v. Mississippi Employment Security Commission and Anderson-Tully Company, 395 So. 2d 964 (Miss. 1981), and Mickel v. Mississippi Employment Security Commission, 765 So. 2d 1259 (Miss. 2000).

In Williams, the plaintiff's unemployment benefits were denied bases on a single letter from the employer that stated the plaintiff had taken a voluntary lay off. Williams is easily distinguishable because the evidence offered was only one letter and the Court held that "*uncorroborated* hearsay is not substantial evidence." Williams, 935 So. 2d at 966 (emphasis added). Additionally, the Court in McGowan v. Mississippi State Oil & Gas Bd., 604 So. 2d 312, 320 (Miss. 1992), stated, "[a]n administrative agency may receive hearsay evidence where it is corroborated or where there is other satisfactory indicia of reliability." In the present case, the Employer has documented warnings in their business records of Ms. Wilson's negligent pattern of behavior as well as first hand information by the Employer's representative.

In Mickel, the Court stated that "[s]ubstantial evidence means something more than a 'mere scintilla' of evidence" and "that is means such relevant evidence as reasonable minds might accept as adequate to support a conclusion." Mickel v. Mississippi Employment Security Commission, 765 So. 2d 1259, 1261 (Miss. 2000). For the case at bar, the Employer's representative again had first hand knowledge and documented warnings in their business

records. This is far from a minute amount of evidence; it is relevant evidence that reasonable minds might accept as adequate to support the conclusion of the ALJ.

Given the uncontested testimony of 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 28, 2007. However, the Employer's appeal was post-marked on June 28, 2007. (See R. Vol. 1, p. 74). 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 July 2, 2007, the envelope clearly shows that the appeal was mailed by June 28, 2007.

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 or the Board of Review. MDES reiterates that the Claimant did not participate in the ALJ hearing and made no argument in support of her position. Moreover, the Claimant did not argue the timeliness of the Employer's Appeal to the Board of Review. In fact,

the Claimant first argues the timeliness issue before the circuit court. 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 or the Board of Review, it has been waived and this Honorable Court cannot consider it now.

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 the case of Wilkerson v. Miss. Emp. Sec. Comm'n, 630 So. 2d 1000 (Miss. 1994), as its main authority to support its position. MDES concedes that while Wilkerson interprets the statute in question, it is 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.

[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. Wilson waived her right to argue this issue when she did not appear before the ALJ or assert this claim to the Board of Review.

[2] At this time ALJ's were referred to as Appeals Referees.

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.

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. 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 was 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.

The Claimant cites to several other cases to support her position, all of which are distinguishable from the case *sub judice*. Holt v. Miss. Emp. Sec. Comm'n, 724 So. 2d 466 (Miss. Ct. App. 2005), addresses the issue of good cause for failing to timely file an appeal. The claimant in Holt asserted that she never received the notice of appeal from MDES and the Court considered whether or not this amounted to good cause. Holt, 724 So. 2d at 468 (¶7 and 8). The facts in Holt are entirely different from those currently before the Court. It is interesting to note; however, that Holt supports MDES's position that an appeal filed by an interested party is filed timely if it is postmarked by the statutory deadline. The Court in Holt, citing to Thames v. Smith Insurance Agency, Inc., 710 So.2d 1213, 1214 (Miss.1998), noted that proof of the sending of mail, postage prepaid to the proper address, creates a rebuttable presumption of timely delivery. Id. at 470 (¶ 20).

The Claimant also cites to Mississippi Emp. Sec. Comm'n, v. Gilbert Home Health Agency, 909 So. 2d 1142 (Miss. Ct. App. 1998) and Mississippi Emp. Sec. Comm'n. v Parker,

903 So. 2d 42 (Miss. Ct. App. 2005). Gilbert dealt with an Employer's appeal to the circuit court from the Board of Review which was filed nearly two weeks after the statutory deadline. Gilbert, 909 So. 2d at 1145 (¶10). Clearly, the facts in Gilbert cannot be compared to those in the case at bar. Likewise, Parker concerned the three (3) day mail rule under Rule 6(e) of the Mississippi Rules of Civil Procedure. Parker, 903 So. 2d at 43 (¶2). As stated earlier, MDES no longer follows this procedure, as such this case is not relevant to the facts currently under consideration.

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 and the Board of Review. 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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Honorable Robert Helfrich
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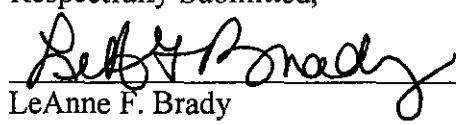
This the 15th day of September, 2009.

Respectfully Submitted,



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