

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

YAMENIA WILSON

APPELLANT

VS.

CAUSE NO.2009-CC-00358

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND
WALMART # 2717

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

BRIEF FOR PLAINTIFF

GLEND A F. FUNCH E S S
ATTORNEY FOR PLAINTIFF
MISSISSIPPI CENTER FOR LEGAL SERVICES
P.O. DRAWER 1728
HATTIESBURG, MS 39403-1728
(601) 545-2950

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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 Court may evaluate possible disqualification or recusals.

1. Appellant, Yamenia Wilson, is the claimant for unemployment benefits.
2. Appellee, Mississippi Department of Employment Security, is the administrative agency which determines eligibility for unemployment benefits.
3. Walmart #2717 was Appellant Yamenia Wilson's employer in Hattiesburg, Mississippi.
4. Glenda F. Funchess is an attorney representing Appellant, Yamenia Wilson and is employed by the Mississippi Center for Legal Services.
5. LeAnne F. Brady, is the Senior Attorney with Appellee Mississippi Department of Employment Security.

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STATEMENT OF THE ISSUES

(1) WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE APPEAL FILED BY EMPLOYER, WALMART #2717 WAS TIMELY?

(2) WHETHER THE TRIAL COURT ERRED IN FINDING THAT EMPLOYER, WALMART #2717 PRESENTED SUBSTANTIAL EVIDENCE WHICH SUPPORTED THE REVERSAL OF THE CLAIMS EXAMINER DECISION GRANTING APPELLANT YAMENIA WILSON UNEMPLOYMENT BENEFITS?

(3) WHETHER THE TRIAL COURT ERRED BY NOT REMANDING THE CASE BACK TO THE ADMINISTRATIVE LAW JUDGE FOR HEARING?

STATEMENT OF THE CASE

Nature of Case

This case involves an appeal from a decision rendered by the Circuit Court of Forrest County, Mississippi which affirmed the denial of unemployment benefits by Appellee Mississippi Department of Employment Security Board of Review.

Course of Proceeding and Disposition in Court and Administrative Hearing

Below:

This case is before this Court on an appeal filed by Appellant Yamenia Wilson from a decision from the Circuit Court of Forrest County, Mississippi. Appellant Yamenia Wilson filed for unemployment benefits after she was terminated from her job at Walmart #2717. A hearing was scheduled before Administrative Law Judge Gary L. Holmes, Jr. for August 8, 2007. Prior to hearing, Appellant Yamenia Wilson's representative submitted the required contact number. Appellant Yamenia Wilson, her witness, Jewel Revies, and her Representative were present and available at the telephone contact number submitted for said hearing.

Appellant did not receive the telephone call at the scheduled time which was 10:00 a.m. The Administrative Law Judge conducted the unemployment hearing without Appellant. On August 8, 2007, Appellant's Representative filed a request with the Administrative Law Judge, Gary L. Holmes, Jr. for a rehearing. Administrative Law Judge Gary L. Holmes, Jr. did not respond to Appellant's Representative's request for a rehearing. Rather, he rendered a decision reversing the decision of the Claims

Examiner. In reversing the Claims Examiner's decision, the Administrative Law Judge found that Appellant Yamenia Wilson was not entitled to unemployment benefits.

Aggrieved by the decision of the Administrative Law Judge, Appellant Yamenia Wilson filed an appeal to Appellee Mississippi Department of Employment Security Office of the Board of Review. Appellant Yamenia Wilson filed her appeal to the Board of Review with a letter brief. Appellee Mississippi Department of Employment Security Board of Review acknowledged receipt of said appeal by letter dated August 24, 2007.

On September 20, 2007, Appellee Mississippi Department of Employment Security Board of Review affirmed the decision of the Administrative Law Judge reversing the Claims Examiner's decision awarding Plaintiff unemployment benefits. Appellant Wilson timely filed an appeal of Appellee Mississippi Department of Employment Security Office of the Board of Review's decision denying her unemployment benefits to the Circuit Court of Forrest County, Mississippi. It is from this decision that Appellant Yamenia Wilson appeals to this Honorable Court.

STATEMENT OF THE FACTS

Appellant Yamenia Wilson last held the position of door greeter with Walmart #2717. Appellant Wilson had been employed with Walmart #2717 for approximately one and one-half (1 ½) years. She was terminated by Walmart #2717 on or about May 31, 2007. Appellant Yamenia Wilson was informed that she was being terminated for failing to place stickers on the children and items to be returned. However, Employer Walmart #2717 stated that client was being discharged for failing to perform her job duties and was discharged in compliance with the company's policy. Appellant Wilson

filed for unemployment benefits and was awarded same by the Claims Examiner.

The decision of the Claims Examiner was appealed by Employer Walmart #2717. Said appeal was stamped filed July 2, 2007. Appellee Mississippi Department of Employment Security appealed the decision of the Claims Examiner. A hearing was scheduled before Administrative Law Judge Gary L. Holmes, Jr. on August 8, 2007. Appellant Wilson's Representative provided a telephone contact number to Administrative Law Judge Gary L. Holmes, Jr. for her hearing. After the call was not received by 10:00 a.m., Appellant Wilson's Representative telephoned Administrative Law Judge Gary L. Holmes, Jr.'s office and inquired about the hearing. The Appellant Wilson's Representative was told by the Administrative Law Judge's assistant that he was simply running behind on his hearings. After Appellant Wilson had not been contacted within one (1) hour of the 10:00 a.m hearing time, she again contacted Administrative Law Judge Gary L. Holmes, Jr.'s office. Appellant Wilson's Representative was advised that the hearing had been conducted.

Appellant Wilson immediately filed a request for a rehearing. Without acknowledging Appellant Wilson's Representative's request for a rehearing, Administrative Law Judge Gary L. Holmes, Jr. reversed the Claims Examiner's award of unemployment benefits for Appellant Yamenia Wilson. In his decision, Appellant Wilson was advised that she may file an appeal within fourteen (14) days to Appellee Mississippi Department of Employment Security Board of Review. An appeal was filed with Appellee Mississippi Department Employment Security Board of Review. Appellee Mississippi Department Employment Security Board of Review adopted the

findings of the Administrative Law Judge.

FACTS

Appellant Yamenia Wilson was employed with Walmart #2717 in Hattiesburg, Mississippi from October 24, 2005 until on or about May 31, 2007. (T.1,11-12) During her tenure with Walmart #2717, Appellant Yamenia Wilson worked in two (2) different positions, first as a cashier and lastly as a door greeter. (T.1,3,12-13,16-18)

According to Employer Walmart #2717, Appellant Wilson was terminated on or about June 1, 2007, because she was talking to a person\customer for more than ten (10) minutes. Employer Walmart #2717 stated that by talking to person ten (10) or more minutes, Appellant Wilson could not have been performing her job because she was unable to pay "...attention to customers." (T.16-17) Appellant Yamenia Wilson filed for unemployment benefits on June 4, 2007. (T.1,3)

Appellee Mississippi Department of Employment Security conducted an interview with Appellant Yamenia Wilson on June 4, 2007. Appellant Wilson informed the representative of Appellee Mississippi Department of Employment Security that she was advised that she was being terminated because she was "...accused of not putting stickers on return items at the door as people came in and not putting smiley faces on the children that came in." Appellant Wilson said this was not true. Appellant Wilson stated that she was never given any warnings or coachings regarding the above infraction or any other infraction. According to Appellant Wilson, "...she was discharged the same day she was told about the problem." (T.3)

Walmart #2717, when contacted by a representative from Appellee Mississippi

Department of Employment Security, "...refused to give separation information." (T.3) Based upon Walmart #2717's refusal to provide Appellee Mississippi Department of Employment Security with information related to Appellee Yamenia Wilson's reason for separation from work, the Claims Examiner awarded Appellant Wilson unemployment benefits on June 14, 2007. (T.3,5) In its notice of award of benefits to Appellant Wilson, from Appellee Mississippi Department of Employment Security, Walmart #2717 was advised that "[i]f you wish to protest this decision, you may ask for reconsideration or file a Notice of Appeal within **fourteen (14) calender days** {emphasis} of the mail date on the decision." (T.5)

Employer Walmart #2717, by and through its "...duly authorized agent..." TALX, filed an appeal which was dated June 28, 2007 but not stamped received by Appellee Mississippi Department of Employment Security until July 2, 2007. (T.6) The Administrative Law Judge, Gary L. Holmes, Jr., scheduled a hearing based upon Walmart #2717 appealed for August 8, 2007 at 10:00 a.m. (T. 7) The hearing was held on the scheduled day, after the 10:00 a.m. time period. Appellant Yamenia Wilson , her witness nor representative participated in the hearing. (T.9, 21-24,26-27) Appellant Yamenia Wilson's representative telephoned Administrative Law Judge Gary L. Holmes, Jr., because a call had not come into the call center at 10:00 a.m. According to the Appellant Yamenia Wilson's Representative, an assistant of Administrative Law Judge Gary L. Holmes, Jr. advised her that the Judge was running behind scheduled and would contact her for her hearing.

Appellant Yamenia Wilson's Representative stated that after about an one (1)

hour, she again contacted Administrative Law Judge Gary L. Holmes, Jr.'s assistant and was advised that the hearing had been conducted with the representative from Walmart #2717, Salenta Patrice Vaughn. (T.9-11, 24). By letter dated August 8, 2007, which was the same date of the hearing, Appellant Yamenia Wilson's representative requested rehearing. (T.24)

Administrative Gary L. Holmes, Jr., on August 8, 2007, failed to respond to Appellant Wilson's request for a rehearing. Rather, he rendered his decision reversing the decision of the Claims Examiner who awarded Appellant Yamenia Wilson unemployment benefits. (T.21-23) On August 16, 2008, Appellant Yamenia Wilson filed an appeal to Appellee Mississippi Department of Employment Security Board of Review, with a letter brief, wherein she again requested a rehearing. (T.28) Appellee Mississippi Department of Employment Security Board of Review acknowledged receipt of Appellant Yamenia Wilson's appeal by letter dated August 24, 2007. (T.28)

On September 20, 2007, Appellee Mississippi Department of Employment Security Board of Review affirmed the decision of the Administrative Law Judge, Gary L. Holmes, Jr. (T.29) Appellant Yamenia Wilson aggrieved by the decision of the Appellee Mississippi Department of Employment Security Board of Review filed an appeal to the Circuit Court of Forrest County, Mississippi. The Circuit Court of Forrest County found that the appeal of Employer Walmart #2717 was timely and that there was substantial evidence to support the termination of Appellant Yamenia Wilson. It is from the decision of the Circuit Court of Forrest County, Mississippi that Appellant Yamenia Wilson files her appeal to this Honorable Court.

SUMMARY OF ARGUMENTS

This case is a simple one. The major issue to be decided in this case is whether an appeal from a decision of the Appellee Mississippi Department of Employment Security not received within the prescribed time frame of fourteen (14) days must be dismissed as jurisdictional. Appellant Wilson's position regarding same is established by statute and codified in law, is jurisdictional. Appellant Wilson's position has been argued by Appellee Mississippi Department of Employment Security in a case at the Supreme Court when it dismissed an appeal as untimely. Appellee Wilson argues that if an appeal is not timely filed with Appellee Mississippi Department of Employment Security, said agency loses jurisdiction of the matter and is unable to hold subsequent appeal hearings..

As to the issue of misconduct, Appellant Wilson argues that there was insufficient proof submitted by Employer Walmart #2717 that Appellant Wilson committed any act that could be construed as misconduct within the meaning of the statute or case law. The burden of proof for such a finding is on the employer.

Lastly, Appellant Wilson, her representative and witness were available on the date and time of her hearing. The hearing was scheduled to begin at 10:00 a.m. When the parties failed to received a telephone call from the Administrative Law Judge shortly after 10:00 a.m., Appellant Wilson's Representative contacted the Administrative Law Judge's Office. The parties were told that the Administrative Law Judge was simply running behind on his hearings. Appellant Wilson and her party waited for one (1) hour before placing another call the to Administrative Law Judge's Office. It was at this

time, they were informed that the hearing had taken place without Appellant Wilson.

Appellant Wilson had complied with all requirements of Appellee Mississippi Department of Employment Security to ensure that she was available for her hearing. Appellant's Representative immediately wrote the Administrative Law Judge requesting a rehearing. Rather than responding to Appellant's request for a rehearing, the Administrative Law Judge simply rendered a decision reversing Appellant award for unemployment benefits.

ARGUMENTS AND LAW

INTRODUCTION

The standard for review of administrative agency's decision by the courts has been established by Supreme Court as:

An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or violates one's constitutional rights. Sprouse v. Mississippi Employment Security Commission, 639 So. 2d 901, 901 (Miss.1994) See also Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors, 621 So. 2d 1211 (Miss.1993); Mississippi Employment Security Commission v. PDN, Inc., 586 So. 2d 838 (Miss.1991) The court, in the case of Farrish Gravel Co., Inc. v. Mississippi State Highway Commission, 458 So. 2d 1066, 1068 (Miss.1984) stated that [i]f an administrative agency exercises power that is not expressly granted or necessarily implied, then the agency's decision is void.

In this case, Appellant Yamenia Wilson, is of the opinion that Appellee

Mississippi Department of Employment Security should have dismissed the appeal, filed by the Employer, Walmart #2717, as untimely. Further, that the evidence presented at the hearing conducted by Appellee Mississippi Department of Employment Security was insufficient to support a finding that Appellant Wilson was guilty of misconduct.

ISSUES

I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE APPEAL FILED BY EMPLOYER, WALMART #2717 WAS TIMELY?

Appellant Yamenia Wilson challenged the timeliness of the appeal filed by Employer Walmart # 2717. Employer Walmart #2717 appeal was mailed on June 28, 2007 and was stamped filed received by Appellee Mississippi Department of Employment Security on July 2, 2007. The decision of the Circuit Court Judge found that said appeal was timely. His holding reads as follows:

Wilson questions whether the appeal filed by Wal-mart #2717 should have been dismissed by the Department as untimely. The Employer's appeal was postmarked on June 28, 2007 and it is standard practice of the Department to use the postmark date in determining the timeliness of an appeal. Therefore, the appeal was timely and any decisions rendered after the expiration of the appeal is proper. (R.92-93)

In its brief on the issue of the timeliness of the appeal, Appellee Mississippi Department of Mississippi Employment Security stated that "[I]t is also the contention of MDES that the appeal filed by Employer was timely in accordance with department practice." It is from this statement in Appellee Mississippi Department of Employment Security's Summary of Argument that the Circuit Court Judge rendered his decision.

(R.60,65)

The decision of the Circuit Court Judge and argument advanced by Appellee Mississippi Department of Employment Security is against not only the statute, case law but Appellee Mississippi Department of Employment Security's own stated policy.

Appellee Mississippi Department Employment Security's Notice to Employer of Claims Determination states in part:

If you wish to protest this decision, you may ask for reconsideration or file a Notice of Appeal within **fourteen (14) calender days** of the mail date on the decision. Holidays and weekends **will not** extend the time for filing the appeal.

(T.5)

Emphasis was added by Appellee Mississippi Department of Employment Security.

Section 71-5-517 of the Mississippi Code of 1972, as amended states that "[t]he 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 evidence in this case establishes that Employer Walmart #2717 appeal was not received by Appellee Mississippi Department of Employment Security until July 2, 2007. This is the date that is stamped on the request for appeal by Appellee Mississippi Department of Security. However, Administrative Law Judge , Gary L. Holmes, Jr. stated in his opening remarks, at Appellant Wilson's hearing, that the appeal by Employer Walmart #2717 was filed on June 28, 2007. This is in direct contradiction of the facts. The appeal was mailed on June 28, 2007. (T.6,11,21)

The Supreme Court has held in a line of cases that the fourteen (14) days set forth by statute must be strictly construed. In the case of Wilkerson vs. Mississippi Department of Employment Security Commission, 630 So. 2d 1000, 1001-1002, (Miss.1994), Anderson Tully, the employer, had received notification of an award of benefits to Sammy Wilkerson on January 18, 1990. Anderson Tully did not file its appeal until the fifteenth (15th) day being, February 2, 1990. The court held that “[t]he Mississippi Employment Security Commission is an administrative agency created by statute which has ‘only such powers as are expressly granted to [it] or necessarily implied to [its] grant of authority.’” Citing section 71-5-517, of the Mississippi Code of 1972, as amended, the court held that “[t]he claimant or any party to the initial determination or amended initial determination may file an appeal from such determination within fourteen (14) days after notification thereof or after the date such notification was mailed to his last known address.”

In the case of Holt v. Mississippi Employment Security Commission, 724 So. 2d 466,468 (Miss. 1998), the court, citing the Wilkerson case, stated that “[i]n the absence of a rule, and none existed then nor now, the strict fourteen-day requirement applied. Interestingly enough, the Court of Appeals of Mississippi in the case styled Mississippi Employment Security Commission v. Parker, 905 So. 2d 613, 616 (Miss.2004), held that Rule 6 of the Mississippi rules of Civil Procedures was applicable and that three (3) days should be added to the prescribed period, being fourteen (14) days after the notification was mailed to the party last address. The Supreme Court, upon Writ of Certiorari filed by Appellee Mississippi Employment Security Commission, reversed

the Court of Appeals reaffirming its earlier decisions, which held that the Mississippi Rules of Civil Procedures were not applicable to administrative hearings. The Court expressly stated that

[u]nless the notification of the decision is made by means other than mailing, the fourteen-day time period to appeal to the Board of Review begins to run on the date the notice is mailed to the parties, Wilkerson v. Miss. Employment Sec. Comm'n. 630 So. 2d 100, 1002 (Miss.1994). That is, where notice of the referee's decision is sent by mail, the fourteen-day time period begins to run on the date that notice is mailed. Furthermore, while holding that an appeal filed one day late was untimely, this court stated that the fourteen day time period as set by statute is to be strictly construed. Mississippi Employment Security Commission v. Parker, 903 So. 2d 42, 44 (Miss.2005)

See also Booth v. Mississippi Employment Security Commission, 588 So. 2d 422 (Miss.1991)

In the case of Cerrato v. Mississippi Employment Security Commission, 968 So. 2d 957, 958-959 (Miss.2007), Plaintiff Tom Cerrato had filed a claim for unemployment after being terminated from his employment. The Claims Examiner denied Cerrato's claim for benefits and mailed notification of the denial of benefits to Cerrato. When Cerrato filed his notice of appeal, the Appeals Referee held a telephonic hearing on April 11, 2006 for the "...sole purpose of determining whether Cerrato's appeal was timely filed or, in the alternative, whether he had "good cause" for failing to file within the appeals period." The court held in Cerrato that his appeal was untimely. Citing section 71-5-517, the court stated as follows:

The statute sets out the applicable appeals period for a claimant or employer who wishes to protest the decision of a MDES claims examiner. It provides, in pertinent part, to wit: The claimant or any party to the initial determination or amended 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 mailed to his last known address. Miss. Code Ann. 71-5-517 (Supp.2007), Wilkerson v. Mississippi Employment

Security Commission, 630 So. 2d 1000 (Miss.1994); Cane v. Mississippi Employment Security Commission., 368 So. 2d 1263, (Miss.1979)

This fourteen-day time period is to be strictly construed, and unless the notification of the decision is made by means other than mailing, the time period to appeal to the board of review begins to run on the date that notice is mailed to the parties. Wilkerson, 630 So. 2d at 1002.

Further, the courts have held that adherence to a specific time period is jurisdictional. As stated earlier, the Court has held that Rule 6 of the Mississippi Rules of Civil Procedure is not applicable in administrative cases. Thus, the time frame established in order to file appeals must be strictly construed. Parker, 903 So. 2d 42 at 44.

In the case of Mississippi Employment Security Commission v. Gilbert Home Health Agency, 909 So. 2d 1142, 1144-1145 (Miss.2005) the Mississippi Employment Security Commission argued that Gilbert's appeal from the decision of the Board of Review to the Circuit was untimely. In that it was beyond the prescribed statutory twenty (20) days and that absence a showing of good cause for the untimely filing, a dismissal was appropriate.

In the case of Westbrook v. Mississippi Employment Security Commission, 910 So. 2d 1135, 1138 (Miss.2005), the court cites the case of Bank of Edwards v. Cassity Auto Sales, Inc., 599 So. 2d 582 (Miss.1992), "...we have held that this time requirement is jurisdictional and will be strictly enforced. In Westbrook, the issue was the timely filing of her appeal to the Supreme Court, which is governed by the Mississippi Rules of Appellate Procedure . The Court continued by stating that "...we will not consider an appeal that is not timely filed."

Thus, failure to file an appeal within the prescribed time period, without a showing of good cause will lead to a dismissal. Since, in unemployment cases, there is a statutorily prescribed period for appeals throughout the administrative levels, failure to adhere to either appeal time frame results in a dismissal and, thus, the agency loses jurisdiction of the matter.

In response to the argument advanced by Appellee Mississippi Department of Employment that the appeal was timely in accordance with department practice, Appellee Mississippi Department of Employment does not cite any legal authority. The Court has held in the case of Steven Varvaris vs. Evelyn Perreault, 813 So. 2d 750, 752 (Miss. 2001), that Varvaris' failure to present any legal authority to support his issue on appeal required the court to find, "... that the issue is waived not only for the failure to cite authority, but the failure to address the issue." The court continued by stating that "[t]he law is well established in Mississippi that this Court is not required to address any issue that is not supported by reasons and authority."

There are a number of other cases in which this principle was also announced by the court. In the case of Roberta Christine Grey vs. Clifford Eugene Grey, 638 So. 2d 488, 491 (Miss.1994), the Appellant raised certain issues in his brief but did not cite any legal authority. The court held that, "Roberta's failure to cite any authority in support of the first three (3) assignments of error precludes this Court from considering these issues on appeal." The court also held in Jennifer Nicole Britt and Larry Doubleday vs. State of Mississippi, 844 So. 2d 1180, 1183 (Miss.2003), "the issue is barred for failure to support the argument with 'citations to the authorities, statutes and parts of the

records relied upon.” See also C.L. Williams vs. State of Mississippi, 708 So. 2d 1358, 1360 (Miss.1998)

Appellant Wilson believes it is clear from the evidence and opinions set forth by the Mississippi Supreme Court regarding timeliness of an appeal involving administrative agencies, that Walmart #2717 failed to timely perfect its appeal from Appellant Yamenia Wilson’s award of benefits. Therefore, Appellee Mississippi Department of Employment Security was without jurisdiction to rendered a subsequent decision after the fourteen (14) days and the appeal by Employer Walmart #2717 should have been dismissed.

II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT EMPLOYER, WALMART #2717 PRESENTED SUBSTANTIAL EVIDENCE WHICH SUPPORTED THE REVERSAL OF THE CLAIMS EXAMINER DECISION GRANTING APPELLANT YAMENIA WILSON UNEMPLOYMENT BENEFITS?

The evidence produced at the hearing held before Administrative Law Judge, Gary L. Holmes, Jr. with Employer Walmart #2717 representative on August 8, 2007, did not support a reversal of the award of unemployment benefits granted by the Claims Examiner. The Supreme Court has been very specific in its rulings regarding what is substantial evidence. In the case of Williams v. Mississippi Employment Security Commission and Anderson-Tully Company, 395 So. 2d 964,965-966 (Miss.1981), the Plaintiff, Susie Williams, was employed by Anderson Tully Company. Anderson Tully laid Ms. Wilson off from her position. However, there was another opening, Ms. Williams stated that she was never given an opportunity to state whether she wanted the

other position. Based upon her testimony, Ms Wilson was awarded unemployment benefits. Anderson Tully, who did not appear at the initial hearing, appealed the award of benefits by letter to the Board of Review arguing that Ms. Williams had taken a voluntarily lay off. The Board of Review reversed the Appeals Referee's decision and denied Ms. Williams' unemployment benefits. The Court held as follows:

[w]e are of the opinion the word 'evidence' in section 71-5-531 should likewise be construed to mean substantial evidence. Application of the substantial evidence rule to the case on appeal would require reversal because uncorroborated hearsay is not substantial evidence, even though hearsay is admissible in an administrative proceeding.

See also Shannon Employment & Construction, Inc. v. Mississippi Employment Security Commission and Reginald Berry, 549 So. 2d 446 (Miss.1989).

In the case of Mickle v. Mississippi Employment Security Commission, 765 So. 2d 1259, 1261, (Miss.2000), citing the case of Delta CMI v. Speck, 586 So. 2d 768, 773 (Miss.1991), this Court discussed the definitions of 'substantial evidence' and found:

Substantial evidence means something more than a 'mere scintilla' of evidence. Johnson v. Ferguson, 435 So. 2d 1191 (Miss.1983) and that it does not rise to the level of 'a preponderance of the evidence.' Babcock & Wilcox Com. v. McClain, 149 So. 2d 523 (Miss.1963). It may be said that it 'means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means ... affording a substantial basis of fact from which the fact in issue can be reasonably inferred.' State Oil & Gas Bd. v. Mississippi Min. & Roy Own Ass'n, 258 So. 2d 767 (Miss.1971) United States v. Harper, 450 F. 2d 1032 (5th Cir.1971).

See also Walden Lumber Yard v. Miller, 742 So. 2d 785 (Miss.1999); Toldson v. Anderson-Tully Company and Liberty Mutual Insurance Company, Inc. 724 So. 2d 399 (Miss.1998)

Appellant Yamenia Wilson maintains that the testimony presented by Employer Walmart #2717 does not meet the substantial evidence test set forth in Williams nor Mickle. The testimony of Assistant Manager Salenta Patrice Vaughn was from records

and she was without first hand information, save and except, one (1) incidence in which she stated that she saw Appellant Yamenia Wilson talking to a customer for ten (10) minutes. (T.11-19) That one (1) incident, clearly, would not meet the misconduct definition as set forth in the line of cases such as Wheeler v. Arriola, 408 So. 2d 1381 (Miss.1982) and Piggly Wiggly v. Mississippi Employment Security Commission, 465 So. 2d 1062 (Miss.1985)

Further, Appellant Yamenia Wilson had denied any counseling, warnings or coachings that was alleged by Walmart #2717 in her statement to the unemployment representative on June 4, 2007. (T.3). Employer Walmart #2717 never produced the first warning slip nor coaching slip with or without Appellant Yamenia Wilson's signature. The Assistant Manager for Employer Walmart #2717 testified that Appellant Yamenia Wilson had a decision day. A decision day requires an employee to write "...a little small paragraph of what are you going to do to correct the problem of what you got the decision day for." When asked if she had a copy of same, the Representative for Employer Walmart #2717 stated that she did not have same in her file. (T.14-15)

Thus, not only must the evidence meet the substantial evidence test but it must also meet the definition of misconduct. The court defined the term misconduct in unemployment cases, 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. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, a 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 inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute. Wheeler v. Arriola, 408 So. 2d

1381, 1383 (Miss.1982)

See also Piggly Wiggly v. Mississippi Employment Security Commission, 465 So. 2d 1062 (Miss.1985); Gore v. Mississippi Security Commission and First Columbus National Bank, 592 So. 2d 1008 (Miss.1992); Otto v. Mississippi Employment Security Commission, 839 So. 2d 547 (Miss.2003); Norman v. Magnolia Regional Health Center, 848 So.2d 213 (Miss.2003); Davis v. Mississippi Employment Security Commission, 858 So. 2d 909 (Miss.2003)

The burden of proof in an unemployment case to prove misconduct is on the employer. In the case of Allen v. Mississippi Employment Security Commission and Vesuvius USA Corporation, 639 So. 2d 904, 906 (Miss.1994), [t]he burden of proving disqualifying misconduct by clear and convincing evidence rests with the employer.

See also Shannon Engineering & Construction, Inc. at 450. At best, the Administrative Law Judge should have found that Appellant Yamenia Wilson was guilty of ordinary negligence. In the case at bar, the Employer Walmart #2717 Representative failed to meet her burden of proof that Appellant Yamenia Wilson had committed any act or participated in any conduct, that meets the definition of misconduct as set forth by law. By failing to meet its burden proving misconduct, Appellant Yamenia Wilson is entitled to receive unemployment benefits.

III

WHETHER THE TRIAL COURT ERRED BY NOT REMANDING THE CASE BACK TO THE ADMINISTRATIVE LAW JUDGE FOR HEARING?

If the Court does not find for Appellant Yamenia Wilson on the other issued raised in this brief, Appellant Yamenia Wilson believes that her case should be remanded back to the Mississippi Department of Employment Security for hearing on the merits. Appellant Yamenia Wilson, her witness and representative were available

and ready for her hearing. Appellant Yamenia Wilson's Representative telephoned the Administrative Law Judge's office shortly after 10:00 a.m. The parties were told the Judge was simply running behind on his hearings but would call. Appellant Wilson waited one (1) hour before again contacting the Administrative Law Judge's office. It was at this time that the Appellant was advised that the hearing had been conducted without her.

The only number that is listed in the file from the Mississippi Department of Security as a call number is Appellant Yamenia Wilson's number. However, Appellant Yamenia Wilson's Representative submitted another number for which the Administrative Law Judge was to use as a contact number. Although this document was not a part of the Appellee Mississippi Department of Security's record, it was a part of Appellant Yamenia Wilson's file. Said record was submitted with the brief of Appellant Wilson as Exhibit 1. (R.51)

Equity dictates that Appellant Yamenia Wilson, who through no fault of her own, should not be denied a rehearing. Appellant Yamenia Wilson's Representative immediately prepared and faxed a request for a new hearing prior to the Administrative Law Judge Gary L. Holmes, Jr. rendering his decision. The Administrative Law Judge simply disregarded Appellant Yamenia Wilson's request for a rehearing and issued his ruling. The Notice of Appeal Rights which is located in the body of the Administrative Law Judge's decision reads as follows:

This decision will become final fourteen (14) days after the date indicated above unless you file an appeal with the Board of Review within that time; or if

neither you nor your representative attended your hearing, you may file a written request with the Administrative Law Judge for a rehearing within the aforesaid fourteen (14) days. Your request should state the reason you failed to attend. The Administrative Law Judge will determine if good cause exists to grant a rehearing. (T.23)

The only response Appellant Yamenia Wilson and her representative received from the Administrative Law Judge was notice of his decision which reversed the Claims Examiner's decision awarding Appellant Yamenia Wilson's unemployment benefits. Appellant Yamenia Wilson maintains that the law of equity would dictate that her case be remanded back to the Mississippi Department of Employment Security for a rehearing.

CONCLUSION

It is clear from the facts in the case at bar, that the appeal filed by Employer Walmart #2717 was due to the Mississippi Department of Employment Security on or before June 28, 2007. The appeal was not stamped received by Appellee Mississippi Department of Employment Security until July 2, 2007 which was outside the fourteen days (14) appeal time. Based upon same Appellee Mississippi Department of Employment Security should have dismissed said appeal as untimely.

If the Court should not find that the appeal by Employer Walmart #2717 was untimely, Appellant Yamenia Wilson maintains that Employer Walmart #2717 failed to meet its burden by establishing that she engaged in any conduct or act that met the statutory definition of misconduct. Thus, she would still be eligible for unemployment benefits.

Lastly, Appellant Yamenia Wilson maintains that if the Court fails to find for her on the above two (2) arguments, that she would be entitled to a remand of her case back to Appellee Mississippi Department of Employment Security. Appellant Yamenia Wilson, her witness and representative were all available for her hearing on the date and time scheduled by the Administrative Law Judge. Appellant Wilson did everything within her power to ensure that she did not miss her hearing including contacting the Administrative Law Judge's Office shortly after 10:00 a.m. when the hearing was scheduled to begin. Appellant was advised that the Administrative Law Judge would contact her, he was simply running behind on his scheduled hearings. Appellant maintains that equity and fairness dictates a new hearing for her if she does not prevail on either of the above issues.

RESPECTFULLY SUBMITTED,

BY:



GLEND A F. FUNCH E S S, MB# [REDACTED]
ATTORNEY FOR APPELLANT
MISSISSIPPI CENTER FOR LEGAL
SERVICES
P.O. DRAWER 1728
HATTIESBURG, MS 39403-1728
(601) 545-2950

CERTIFICATE OF SERVICE

I, Glenda F. Funchess, Attorney for Appellant, do hereby certify that I have this date mailed, by United States mail, a true and correct copy of the Appellant's Brief to each of the following persons, at his/her last known address:

LeAnne F. Brady, Esquire
Senior Attorney for Appellee Mississippi Department of Employment Security
Post Office box 1699
Jackson, MS 39215-1699

Honorable Robert Helfrich
Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403-0309

This the 24th day of June 2009.



GLEND A F. FUNCHESS