

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CC-01049**

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLANTS

VS.

CHANDRA SHIELDS


APPELLEE

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 representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, Appellant
2. Honorable LeAnne F. Brady, Esq., Attorney for Appellant
3. Chandra Shields, Appellee
4. Lowe's Home Center, Inc., Employer
5. Honorable Jannie M. Lewis, Circuit Court Judge – Humphreys County,
District 21

This the 9th day of December, 2009.



LeAnne F. Brady, Esq.

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**BRIEF OF THE APPELLANT
MISSISSIPPI DEPARTMENT EMPLOYMENT SECURITY**

STATEMENT OF ISSUES

1. Whether the Circuit Court erred, abused its discretion, and substituted its opinion on this appeal for that of the Board of Review, by finding that there was not substantial record evidence to find that Chandra Shields abandoned her job, and thus voluntarily quit, by failing to return to work when her leave of absence terminated on March 1, 2008?

2. Conversely, whether the Circuit Court erred, abused its discretion, and substituted its opinion for that of the Board of Review, by finding that the Employer, Lowe's Home Center, Inc., discharged Chandra Shields for not returning to work from a leave of absence?

3. Whether the Board of Review's decision was supported by substantial evidence, finding that Chandra Shields abandoned her employment with Lowe's Home Center, Inc., by not returning to work when her leave of absence expired on March 1, 2008?

4. Whether Chandra Shields failed to take reasonable and necessary steps to protect her job by failing to return to work when her leave of absence terminated on March 1, 2008, or by failing to contact her direct supervisor or the store manager about returning to work thereafter?

STATEMENT OF THE CASE

The Mississippi Department of Employment Security is referred to herein as "MDES" or "Department".

Chandra Shields [hereinafter also "Claimant"] was employed as a cashier by Lowe's Home Center, Inc. [hereinafter also "Employer"] from November 16, 2005, to March 1, 2008. (R. Vol. 2, p. 42). Ms. Shields was considered by the Employer to have voluntarily quit her job on or about that date when she did not return from a leave of absence. (R. Vol. 2, p. 42). Ms. Shields was scheduled to return to work on that date, but did not. In fact, she never attempted to return to work. Further, Ms. Shields knew that her leave of absence ended the first of March 2008. (R. Vol. 2, p. 47). Nevertheless, she did not contact the Employer until "sometime" after March 1, 2008, by which time she had been terminated due to job abandonment. (R. Vol. 2, p. 44, 52).

Ms. Shields filed for unemployment benefits on September 9, 2007. (R. Vol. 2, p. 1). A Claims Examiner investigated by interviewing Ms. Shields and an Employer representative. (R. Vol. 2, p. 10-14). Ms. Shields also submitted medical documents regarding her child's premature birth and subsequent illness. (R. Vol. 2, p. 16-18). The MDES also obtained a UI-538 Doctor's Certificate. (R. Vol. 2, p. 5).

According to this investigation, statements from the parties, and medical records indicated that Ms. Shields was on an approved medical leave of absence until January 6, 2008, due to her pregnancy, and her child's premature birth and complications thereafter. (R. Vol. 2, p. 5, 10-12). Ms. Shields was released by her physician to return to work without restrictions on December 4, 2007. (R. Vol. 2, p. 5, 10-13). She then requested additional leave to care for her baby, who was premature, and had surgery to repair a hernia. She never returned to work thereafter. (R. Vol. 2, p. 13).

After considering these documents, and the parties' statements, the Claims Examiner disqualified Ms. Shields for initiating her separation from work due to lack of child care, which did not constitute good cause for doing so. (R. Vol. 2, p. 21).

Ms. Shields appealed; and a Hearing was held. (R. Vol. 2, p. 23, 32-55). Ms. Shields testified. Pete Wheeler, Store Manager, and Pamela Dees, Department Manager, testified for the Employer. (R. Vol. 2, p. 32-55). Afterwards, the Administrative Law Judge [hereinafter "ALJ"] affirmed the Claims Examiner; and denied benefits to Ms. Shields. (R. Vol. 2, p. 56-58). In so doing, the ALJ found that Ms. Shields was granted a leave of absence on January 7, 2008, and was scheduled to return to work on March 1, 2008. When she did not, and provided no reason for not returning to work, she abandoned her job without good cause. (R. Vol. 2, p. 57).

Ms. Shields again appealed. (R. Vol. 2, p. 59). After carefully considering the record, the Board of Review affirmed the ALJ, adopting her Fact Findings and Decision. (R. Vol. 2, p. 63-64). The following is the ALJ's Findings of Fact and Decision, in pertinent part, to-wit:

Findings of Fact:

The claimant was employed from November 16, 2005, until March 1, 2008, as a cashier, by Lowes Home Centers Incorporated, Flowood, Mississippi, when she left her job due to job abandonment.

The claimant gave birth to her child on October 19, 2007. The baby had a health problem and needed surgery.

The employer granted the claimant a personal leave of absence on January 7, 2008, to be with her child for medical reasons. The claimant was scheduled to return to work on March 1, 2008, which she failed to do.

The claimant's job was not under threat of discharge, and continued work was available at the time she quit.

The claimant provided no reason for not returning back to work, and provided no medical documentation for the record.

Reasoning & Conclusion:

The claimant abandoned her employment when she failed to return to work. The claimant's job was not under threat of discharge, and continued work was available when she quit.

The claimant's actions for job abandonment do not show good cause as that term is defined by the Law.

The decision of the Claims Examiner will be modified as to the date of the disqualification period only.

(R. Vol. 2, p. 57-58).

Ms. Shields appealed from the Board of Review's decision to the Circuit Court of Humphreys County. (R. Vol. 1, p. 7). The Department subsequently filed its Answer in the record on January 9, 2009. (R. Vol. 1, p. 11). No briefs were filed to the Circuit Clerk.

On March 16, 2009, the Circuit Court reversed the Board of Review's decision finding that the record evidence did not support the Board of Review's finding that Ms. Shields abandoned her job. (R. Vol. 1, p. 2-6). In so ruling, the Court erred by relying entirely upon Ms. Shields assertions that she was discharged. The Court also dispensed with the Employer's witnesses' testimony that Ms. Shields did not attempt to return to work when her leave terminated, nor did she attempt to contact her immediate

supervisor, or her store manager. Instead the Court erred by relying upon Ms. Shields testimony that she was not required to return to work until she notified the Employer that she was ready to return to work, and her leave continued until that time. (R. Vol. 1, p. 2-6).

MDES timely appealed from this decision. (R. Vol. 1, p.13). The basis of MDES' appeal is that the Circuit Court erred by failing to recognize that the record contains substantial evidence supporting the Board of Review's decision that Ms. Shields knew her leave of absence ended March 1, 2008, and she abandoned and voluntarily quit her job, by failing to return to work, or otherwise take reasonable steps to protect her job after that time.

SUMMARY OF THE ARGUMENT

Whether an employee has been terminated or voluntarily quit is a fact question. Such a determination is within the purview of MDES to determine from all of the surrounding facts and circumstances. Mississippi Employment Security Commission vs. Fortenberry, 193 So. 2d 142,143 (Miss. 1966). Huckabee v. Mississippi Employment Security Comm'n., 735 So. 2d 390, 326 (Miss 1999). Further, the appellate Courts are bound by the Department's decision as to whether an employee voluntarily quit or was discharged, as long as there is substantial evidence supporting that decision. Hodge v. Mississippi Employment Sec. Comm'n., 757 So. 2d 268, 270 (Miss. 2000); NCI Building Components v. Berry, 811 So. 2d 321, 326 (Miss. Ct. App. 2001).

In this case, Ms. Shields testified that she did not return to work after a phone conversation with the Employer's Human Resources department during the first week of March 2008, in which she was allegedly told that she was terminated. However, there was no dispute that she knew her leave of absence ended on or about March 1, 2008, and she did not attempt to return to work by that date, or after that date.

She also did not contact the store manager, or her immediate supervisor at all; and she has never attempted to return to work. There was also no testimony from the Employer representative indicating that she was under any threat of discharge, or that she could not return to work on March 1, 2008. The Employer representative's testimony, along with her immediate supervisor's testimony, was that she never contacted them, or attempted to return to work.

According to the record, continued work available, and since Ms. Shields did not to return, there is substantial evidence supporting MDES's decision that she quit. Further, Ms. Shields did not contact the Employer's Human Resource department until sometime after March 1, 2008, nor did she attempt to clarify her alleged termination with her store manager, or direct supervisor, or return to work, she effectively abandoned her job. Further, the record indicates that she had no real interest in returning to work when her leave expired on March 1, 2008, due to her new born baby's illness.

As to the issue of whether Ms. Shields had good cause for quitting, a claimant has the burden of proving good cause for quitting his/her employment. Miss. Code Ann. § 71-5-513(A)(1)(a)(2008). Further, the case authorities and statute provide that quitting to take care of a sick child falls within the marital or filial exclusion; and will not be good cause under the Employment Security Law. Id.; See also Mississippi Employment Security Commission v. Stafford, 248 Miss. 95,158 So.2d 55 (Miss. 1963).

The case authorities have also addressed circumstances that may or may not be considered good cause for quitting, and indicate that a worker must take reasonable steps to protect his/her job under the circumstances. See Mississippi Employment Security Commission v. Stafford, 248 Miss. 95, 98, 158 So.2d 55, 56 (Miss. 1963)(leaving work to take care of a sick mother is a family circumstance and thus not good cause under the applicable statute); Otto v. Mississippi Employment Security Commission, 839 So. 2d 547 (Miss. Ct. App. 2003)(employee failed to take reasonable steps to protect her job by leaving work during a shift, and abandoned her job); Mississippi Employment Security Commission v. Pulphus,

538 So. 2d 770, 772 (Miss. 1989)(lack of transportation to and from work is a personal circumstance to be resolved by the worker; and thus, not good cause for quitting); NCI Building Components v. Berry, 811 So. 2d 321, 329 (Miss. Ct. App. 2001)(employee has an obligation to take reasonable steps to protect his job, and comply with the employer's instructions).

In this case, the Circuit Court held that the evidence indicated that Ms. Shields was referred to the Employer's Human Resource department during her leave of absence, and she stayed in touch with the Human Resource department. Thus, the Circuit Court held that there was insufficient evidence in the record to support the MDES' determination that she abandoned her job. However, in so ruling, the Circuit Court erred by failing to recognize the record evidence establishing that (1) Ms. Shields knew that her leave ended on or about March 1, 2008, (2) that she did not contact the Human Resource department until sometime thereafter, (3) that she never actually attempted to return to work, or contact her immediate supervisor, or the store manager, about returning to work, and (4) that she has never attempted to return to work thereafter. These facts alone were sufficient evidence of job abandonment.

Since Ms. Shields chose not to return to work as scheduled, since work was available on March 1, 2008, and since she failed to take reasonable and timely steps to protect her job by returning to work or contacting her store manager or immediate supervisor, the Board's decision that she quit work without good cause was supported by the evidence. Thus, this Honorable Court should reverse the Circuit Court and reinstate the decision of the Board of Review.

ARGUMENT

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, if the Board's Findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing Court must affirm. Id.

In the instant case, Chandra Shields testified first. (R. Vol. 2, p. 35-40). Ms. Shields stated that she worked as a cashier from November 16, 2005, until August 31, 2007. She also stated that she was fired, because she was out too long on maternity leave. (R. Vol. 2, p. 37).

Regarding her maternity leave, Ms. Shields explained that her child was born prematurely on October 19, 2007; and was under her doctor's care for six weeks afterwards. She was released to return to work in December 2007. (R. Vol. 2, p. 37). She did not return, because her baby was still in the hospital for surgery.

Ms. Shields requested additional time off work. Ms. Collins completed her paperwork; and the extension of her first leave of absence was granted. At that time, Ms. Collins testified that she instructed Ms. Shields to call and keep in touch with Human Resources. Ms. Shields stated that she called periodically and spoke to "Danika" each time. (R. Vol. 2, p. 40).

She was to return from her second leave of absence in March 2008. (R. Vol. 2, p. 38). She could not remember the exact date that she called in March, but thought it was the first week of March.

She spoke to Ms. Lee Collins sometime in March, but she could not remember the exact date. (R. Vol. 2, p. 38). Ms. Collins told her that she had been discharged.

Ms. Shields was also questioned further about the discharge. She stated that she was under no threat of discharge while she was out on leave, because she had a doctor's excuse regarding her baby's surgery. (R. Vol. 2, p. 38-39).

Mr. Pete Wheeler, store manager, testified next. (R. Vol. 2, p. 42-48). Mr. Wheeler stated that Ms. Shields was employed as a cashier from November 16, 2005, until March 1, 2008. Regarding her separation from work, Mr. Wheeler stated that she abandoned her job by failing to return after her second leave of absence ended. (R. Vol. 2, p. 42). She was not under any threat of discharge until failing to return to work on March 1, 2008. Mr. Wheeler also commented that the Employer needed her; and was actually hiring at that time. (R. Vol. 2, p. 42-43).

Mr. Wheeler was questioned further about Ms. Shields' two leaves of absence. He stated that he investigated and found paperwork on the first leave of absence. The first leave of absence was classified as FMLA. When it ended, Ms. Shields requested a second leave of absence, which was granted on January 7, 2008, for personal reasons. She was scheduled to return on March 1, 2008. (R. Vol. 2, p. 43).

Regarding her failure to return to work, Mr. Wheeler stated that she never contacted him. He also apparently attempted to speak to Lee Collins in Human Resources, but she was no longer employed there. Thus, he reviewed the paperwork; and found nothing stating that Ms. Shields had called to request an additional leave of absence, after her leave expired on March 1, 2008. Mr. Wheeler stated that Ms. Collins was very meticulous in her paperwork. (R. Vol. 2, p. 44).

Mr. Wheeler also spoke to the department manager, Pamela Dees, who stated that Ms. Shields had not contacted her for an extension of her leave. (R. Vol. 2, p. 44). Mr. Wheeler stated that he

never heard from Ms. Shields; and still had not heard from her. (R. Vol. 2, p. 44). He commented that the company probably would have granted her a third leave of absence, if she had requested it. He stated that there were no signs that she requested additional leave; and no one could corroborate a request. (R. Vol. 2, p. 44). He also stated that they had no medical documents that said she could not return to work after the first leave of absence expired. That was why she was placed on personal leave of absence the second time. (R. Vol. 2, p. 45).

During his closing statements, Mr. Wheeler stated that Ms. Shields was separated from her employment on March 1, 2008, for job abandonment. He signed the paperwork. He also stated that he was sure calls were made to Ms. Shields from Human Resources about returning to work. He stated that it was the Employer's practice to continuously call an employee before separation due to job abandonment. (R. Vol. 2, p. 52). Mr. Wheeler concluded by stating that he never heard from Ms. Shields; and she never called to question him as to whether or not she had been terminated. (R. Vol. 2, p. 52).

Ms. Pamela Dees also testified on behalf of the Employer. Ms. Dees was Ms. Shields direct supervisor, and the cashier department manager. (R. Vol. 2, p. 48). Ms. Dees stated that she was in charge of customer service; and Ms. Shields was one of her cashiers. (R. Vol. 2, p. 49-50). Ms. Shields never contacted her about returning to work after going out on maternity leave. (R. Vol. 2, p. 50). Ms. Dees had no personal knowledge as to whether Ms. Shields ever called Human Resources to talk to Danika or Lee Collins. Ms. Dees only knew that Ms. Shields never called her. (R. Vol. 2, p. 50).

Ms. Dees also commented that sometime after March 1, 2008, she saw Ms. Shields while in her car stopped at an intersection. She spoke to Ms. Shields out of the window. She asked Ms. Shields

why she did not come back to work. Ms. Shields stated that she did not want to work there any longer. (R. Vol. 2, p. 50).

In closing remarks by Ms. Shields, she admitted that she knew she was on a second leave of absence, and that she was to return to work in March 2008. She further acknowledged that she did not return to work at that time, but alleged she did call the Human Resource Department during the first week of March. She spoke to Lee Collins; and was told at that time, that she had been discharged. (R. Vol. 2, p. 45-48).

The case of NCI Building Components v. Berry, 811 So. 2d 321 (Miss. Ct. App. 2001) is instructive regarding whether Ms. Shields quit or was terminated.

In Berry, the issue was whether Mr. Berry voluntarily quit or was discharged. The facts indicated that Mr. Berry had been disciplined for excessive absenteeism. Berry, 811 So. 2d at 324. Subsequently, his supervisor allowed him to take a couple of days off, but he was nevertheless required to call in those absences according to company policy. Id. Mr. Berry did not call in; and the policy called for termination after three successive absences without calling in. Id. On the day following these two absences, Mr. Berry came into the office to pick up his paycheck. Id. He was scheduled to work the night shift. Id. Mr. Berry then spoke to the personnel administrator about two items of business that were apparently somewhat contentious. Id. at 325. Mr. Berry then asserted that he was terminated. Id. The supervisor denied he was terminated, stating that he did not have the authority to do so. Id. Mr. Berry apparently did not return to work after that. Id.

In Berry, the Court held that the evidence was that work was still available to Mr. Berry; and the evidenced supported the Department's determination that Mr. Berry voluntarily quit. Id. at 329-330. The Court further held that he did not take reasonable steps to protect his job by discussing his employment with his supervisors and did not return to work thereafter. Id.

The Berry case is instructive, because it not only sets out the employees obligations, but the judicial deference to which MDES decisions are entitled. The Berry case again sets out an employee's obligation to take reasonable steps to comply with the employer's request, and protect his/her job. The case also recognizes that the appellate Courts should give judicial deference to the MDES's decisions regarding the separation issue, even where the testimony is conflicting on whether a quit or discharge occurred.

In that regard, in the instant case, Ms. Shields analogously failed to take the necessary step of return to work, or clarify whether she had actually been discharged. Further, the Employer's witnesses presented sufficient evidence upon which the Board of Review based its decision that Ms. Shields' failure to return to work, or failure to take steps to protect her job, constituted job abandonment. Thus, the Circuit Court failure to follow the applicable law, and correctly apply the evidence, was an abuse of its discretion, a substitution of its opinion in place of the MDES's determination, and judicial error.

CONCLUSION

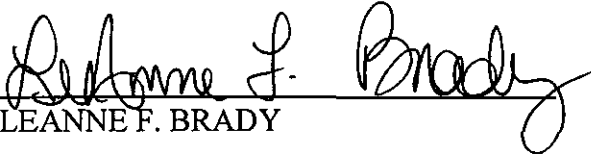
Whether Ms. Shields quit or was terminated is a question of fact. MDES has the authority to make this determination; and it correctly determined that under the facts, Ms. Shields quit by not returning to work on March 1, 2008, or thereafter. The facts support this decision. Ms. Shields admits that she did not return to work. Although she denies that she quit, her actions and inactions effectively amount to a quit. Thus, the facts of this case establish that Ms. Shields voluntarily quit work to remain at home with her new, ill baby.


Substantial evidence can be found in the record to support the Board of Review's decision that Ms. Shields failed to take reasonable steps to protect her job by attempting to return to work, or contacting her immediate supervisor or store manager about returning to work. There is also ample evidence to support the Board of Review's decision that she failed to prove good cause for not doing

so by March 1, 2008. Thus, the Circuit Court should be reversed, and the decision of the Board of Review should be reinstated by this Honorable Court.

RESPECTFULLY SUBMITTED, this the 9th day of December, 2009.

**MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY**

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CERTIFICATE OF SERVICE

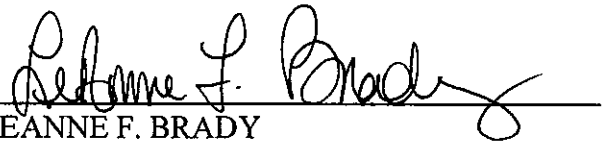
I, LEANNE F. BRADY, Attorney for Appellant, Mississippi Department of Employment Security, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to the following:

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Honorable Jannie M. Lewis
Circuit Court Judge, District 21
Post Office Box 149
Lexington, MS 39095

THIS, the 9th day of December, 2009.


LEANNE F. BRADY