

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS**

CASE NO. 2009-CC-01132

JAMES HENRY

APPELLANT

V.

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

**BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

**APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY
STATE OF MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

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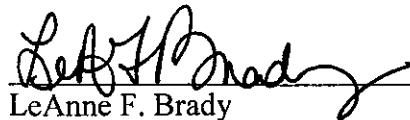
APPELLEE

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 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, Appellee
2. LeAnne F. Brady, Senior Attorney for Appellee
3. Albert Bozeman White, Assistant General Counsel for Appellee
4. James C. Henry, Appellant
5. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 2 day of June, 2010.



LeAnne F. Brady
Senior Attorney (MSB #100793)
Mississippi Department of Employment Security
Albert Bozeman White
Assistant General Counsel (MSB #7132)

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court and Board of Review's decisions should be affirmed, finding that the Claimant, James Henry, defaulted, and abandoned his appeal, by failing to participate and offer proof at the Administrative Law Judge's telephonic hearing scheduled for October 31, 2008, pursuant to the provisions of Unemployment Insurance Regulations of the Mississippi Department of Employment Security, Benefit Appeal Regulation No. 200.05.

2. Whether Substantial evidence can be found in the record that the Employer, Wal-Mart, proved by that the Claimant, James Henry, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A (1)(b)(2009).

STATEMENT OF THE CASE

James Henry [also hereafter referred to as "Claimant"] was employed for approximately four years as a people greeter associate at Wal-Mart [also hereafter referred to as "Employer"]. He was discharged on July 10, 2008, for violating company policy prohibiting dishonesty. (R. Vol. 2, p. 6, 14).

After his termination, the Claimant filed for unemployment benefits effective July 15, 2008. (R. Vol. 2, p. 1). An investigation was conducted by the Mississippi Department of Employment Security [hereafter "MDES"] to determine the Claimant's eligibility for unemployment benefits. (R. Vol. 2, p. 5-7). A Claims Examiner interviewed the Claimant and an Employer representative, Ryan Flanery. Mr. Flanery stated that the Claimant was discharged for returning a DVD left by a customer, as if it was a DVD that he had purchased. Video surveillance was reviewed by the Employer, which revealed that a customer left the DVD, and the Claimant took it to customer service. The Claimant returned the DVD and received the refund, which was considered to be fraudulent, and grounds for immediate discharge. (R. Vol. 2, p. 14-16). The Claimant stated that he was returning the DVD for a friend. (R. Vol. 2, p. 16).

Based on the investigation, the Claims Examiner found that the Claimant made a fraudulent refund and thereby, committed disqualifying misconduct. (R. Vol. 2, p. 6). The Claimant filed a Notice of Appeal of this decision on September 11, 2008. (R. Vol. 2, p. 10).

A telephonic hearing before an Administrative Law Judge [hereafter "ALJ"] was scheduled for October 31, 2008. (R. Vol. 2, p. 24-29). On the scheduled date of the hearing, October 31, 2008, the ALJ attempted to contact the Claimant, and was unable to reach him at the number provided by the Claimant. A voice mail message was left advising the Claimant that he had a limited time in which to call the ALJ and participate in the hearing. The Claimant failed to call within the time provided and participate in the hearing. (R. Vol. 2, p. 31). Thus, the ALJ

determined that the Claimant abandoned the appeal, and dismissed the claim. Notice of this decision was mailed to the Claimant on November 3, 2008. (R. Vol. 2, p. 30-32).

The Claimant timely appealed the ALJ's decision. (R. Vol. 2, p. 33). On December 19, 2008, the Board of Review affirmed the ALJ's decision. (R. Vol. 2, p. 36-37). The ALJ's decision in pertinent part was as follows, to-wit:

The claimant timely appealed a determination of the Mississippi Department of Employment Security which was mailed on 09/09/2008 regarding the issue Discharge – Other.

A Telephone hearing before the Administrative Law Judge was scheduled for 10/31/2008, at 10:15 AM CST.

The Appeals Tribunal Office mailed a Notice of Hearing to the interested party on 10/20/2008.

Mississippi Department of Employment Security Regulations provide for an informal disposition of any adjudicatory proceeding by default when the appealing party or the party with the burden of proof fails to appear at the scheduled hearing, provided notice of the consequences of such failure to appear has been given said party. A party shall be deemed to have failed to timely appear at a hearing when the party fails to appear as provided in the Notice of Hearing, including calling an Appeals Department telephone number or providing in advance a telephone number as required by the notice of the hearing, or by failing to be present at the telephone number provided by the party for 10 or more minutes past the scheduled start time of the hearing.

After due notice was provided for the date, time and place of the hearing, the appellant in this case did not participate in the hearing. The appellant has not given notice of any reason or cause for non-appearance.

The Administrative Law Judge has determined that the appeal has been abandoned. The decision of the Mississippi Department of Employment Security is affirmed and the appeal is hereby DISMISSED.

(R. Vol. 2, p. 31-32).

The Claimant then appealed to the Circuit Court of Desoto County. (R. Vol. 1, p. 4-9). MDES filed its Answer on February 2, 2009. (R. Vol. 1, p. 9-10). The Claimant filed a Response on February 3, 2009. (R. Vol. 1, p. 11-12). MDES filed its Brief on March 2, 2009. (R.

Vol. 1, p. 13-21). Subsequently, Honorable Robert Chamberlin affirmed the decision of MDES on June 5, 2009. (R. Vol. 1, p. 22).

The Claimant appealed from the Circuit Court's decision to this Honorable Court. (R. Vol. 1, p. 23-26).

SUMMARY OF THE ARGUMENT

Pursuant to its rule-making authority, MDES has adopted Benefit Appeal Regulations. Miss. Code Ann. § 71-5-525 (Miss. 2009). MDES Benefit Appeal Regulation No. 200.05 addresses failure to timely participate in a hearing. MDES Benefit Appeal Regulation 200.05 (A) provides that the Appeals Department may make an informal disposition by default when the appealing party fails to appear. Failure to appear or participate 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 Section 71-5-525 (Miss. 2009), and the regulation making authority of MDES. A copy of all MDES Benefit Appeal Regulations cited herein is attached hereto as Exhibit "A".

In the present case, the record before the Claims Examiner reflected that the Claimant was terminated due to the return of a DVD that was not his. (R. Vol. 2, p. 14). Video surveillance confirmed the fraudulent return and refund. A co-worker reported that the Claimant's return of the DVD and refund looked suspicious. (R. Vol. 2, p. 15-16). After an investigation by the Employer, the Claimant was discharged for violating company policy.

The Claimant did not participate in the hearing before the ALJ. MDES Regulations provide that when the Appellant fails to pursue the appeal by participating in the hearing, the case may be dismissed for want of prosecution. Id. Consistent with this Regulation, the ALJ found that the Claimant abandoned his appeal and dismissed the case. MDES Benefit Appeal Regulation No. 200.05. (R. Vol. 2, p. 30-32).

Since MDES appropriately made an initial determination that the Claimant was terminated for disqualifying misconduct, and since he abandoned his appeal by failing to

participate in the ALJ hearing, this Honorable Court should affirm the decisions of the Board of Review and Circuit Court.

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. Miss. Pub. Serv. Comm'n v. Merchant's Truck Line, Inc., 598 So. 2d 778, 782 (Miss. 1992).

II. *The Circuit Court and Board of Review's decisions should be affirmed, finding that the Claimant, James Henry, defaulted, and abandoned his appeal, by failing to participate and offer proof at the Administrative Law Judge's telephonic hearing scheduled for October 31, 2008, pursuant to the provisions of Unemployment Insurance Regulations of the Mississippi Department of Employment Security, Benefit Appeal Regulation No. 200.05.*

Pursuant to its rule-making authority, MDES has adopted Benefit Appeal Regulation 200.05, which addresses failure to appear and participate in a hearing. Miss. Code Ann. § 71-5-525 (2009). MDES Benefit Appeal Regulation 209.00 provides that notice shall be given by mail. MDES Benefit Appeal Regulation 200.05 provides that failure to appear is a default or abandonment of the appeal; and a default ruling may be entered. This Regulation also provides that when a party fails to appear, MDES has the discretion to refuse to re-open a hearing. Thus, the issue regarding the Claimant's default is within MDES's authority to determine under Mississippi Code Annotated Section 71-5-525 (2009), and the regulation making authority of the Department.

The Claimant was mailed the Notice of Telephone Hearing on October 20, 2008. (R. Vol. 2, p. 25). This notice informed the Claimant of the date and time, along with instructions to call, if he was not contacted by the ALJ. (R. Vol. 2, p. 25). This notice also advised the Claimant that **"if the appealing party is not available for the hearing, the appeal is dismissed and the original determination upheld."** (R. Vol. 2, p. 28).

In his appeal, the Claimant argued following the Board's decision, that he was never called by the ALJ; and that he called to participate in the hearing, was placed on hold, and never connected with the ALJ. (R. Vol. 1 p. 7-8). This argument should not be considered by this Court. MDES's call recording system reflects that the Claimant called in, but it was after the time frame provided. This same system also shows that the ALJ contacted the Claimant at the number provided and left a voicemail advising the amount of time available for the Claimant to call back, as well as the direct telephone number of the ALJ. However, the case was dismissed, because the Claimant did not call within the time provided.

The Court previously considered whether dismissal of an appeal was appropriate if the appealing party fails to participate in Mississippi Department of Employment Security v. Johnson, 977 So. 2d 1273 (Miss. Ct. App. 2008). Applying MDES *Benefit Appeal Regulation* 10, the forerunner to MDES *Benefit Appeal Regulation* 200.05, the Court held that the claimant's failure to participate in the scheduled hearing was properly deemed an abandonment of his appeal, and properly dismissed by MDES. In so doing, the Court also stated that the Regulation comported with the authority granted to MDES to promulgate rules and regulations. *See also Tillmon v. Mississippi Department of Employment Security*, 996 So. 2d 825 (Miss. Ct. App. 2008) (dismissal of the claimant's appeal for failure to participate in the ALJ hearing was proper).

III. *Substantial evidence can be found in the record that the Employer, Wal-Mart, proved by that the Claimant, James Henry, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513A (1)(b)(2009).*

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). Mississippi Code Annotated Section 71-5-513 also provides that the Employer has the burden of proof to show misconduct on the part of the Claimant.

In the present case, the Claimant's appeal was dismissed because he failed to participate in the hearing. However, even if this Court were to find the Claimant had good cause for failing to participate in the ALJ hearing, substantial evidence can be found in the record to prove he was

terminated for misconduct. The Claimant was terminated because he took a DVD left behind by a customer, returned it through customer service, and received a refund. (R. Vol. 2, p. 14-16). The Claimant stated to the Claims Examiner that he did not have a receipt, and that he did not request the employee discount because the DVD did not belong to him. (R. Vol. 2, p. 16). The Claimant also stated that he asked his co-worker to sign off on the return; and the co-worker informed the manager that the DVD return looked suspicious. (R. Vol. 2, p. 15). In rebuttal, the Employer stated to the Claims Examiner that the incident was observed on video, showing that a customer left the DVD; the Claimant picked up the DVD, took it to customer service, and received a refund. (R. Vol. 2, p. 15-16).



The Claimant stated that he was not aware of any company policy or rule related to his reason for discharge, but contradicts that statement by acknowledging he was informed of the policy/rule by handbook/handout. (R. Vol. 2, p. 15). The Claimant was therefore aware of appropriate employee behavior, yet proceeded to violate it by engaging in fraudulent activity, constituting disqualifying misconduct.

CONCLUSION



The Claimant failed to participate in the hearing before the Administrative Law Judge, abandoned his appeal pursuant to MDES Benefit Appeal Regulations; and MDES appropriately dismissed his appeal. Furthermore, the record shows that the Employer proved by substantial evidence that the Claimant was discharged for misconduct connected with work, 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 decisions of the Board of Review and Circuit Court in this matter.

RESPECTFULLY SUBMITTED this, the 2d day of June, 2010.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

BY: 
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CERTIFICATE OF SERVICE

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

James C. Henry, Appellant
Post Office Box 142
Olive Branch, MS 38654-0925

Honorable Robert P. Chamberlin, Jr.
Circuit Court Judge, Desoto County
Post Office Box 280
Hernando, MS 38632-0280

THIS, the 2nd day of June, 2010.

BY: 
LEANNE F. BRADY, Senior Attorney

UNEMPLOYMENT INSURANCE
REGULATIONS

THE MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

As of December 1, 2007

Exhibit "A" to Brief of
Mississippi Department of Employment Security

"ALJ" stands for Administrative Law Judge. The ALJ is the MDES official who presides over unemployment benefit and tax rate appeals.

"WIN Job Center" stands for Workforce Investment Network Job Center. A WIN Job Center is an office that provides convenient, one-stop employment and training services to employers and job seekers. The center combines federal, state, and community workforce programs. These centers are found throughout the state.

Any reference to the word "Department" shall mean the Mississippi Department of Employment Security.

BENEFIT APPEAL REGULATIONS

200.0 Administrative Law Judge Defined

- (A) For purposes of the Law, a referee shall be an Administrative Law Judge (ALJ) as used throughout the following Regulations.
- (B) Pursuant to and as provided by the Employment Security Act, appealed claims shall be heard and decided by an ALJ.
- (C) Pursuant to and as provided by the Law, appeals of ALJ's decisions shall be heard and decided by the Board of Review.

- (6) The decision of the Board of Review and the Appeals Department

The record does not include documents submitted to the Agency prior to an appeal being filed that are not either resubmitted after the appeal is filed or discussed during the hearing.

- (H) **Other recordings:** In order to assure the confidentiality of hearings before an ALJ, no party or participant at a hearing shall be permitted to record such hearing by any means, and the recording made by the ALJ shall be the official record of the proceeding. This prohibition is pursuant to the provisions of Sections 71-5-127 and 71-5-525 of the Law.

- (J) **Dismissal Due To Behavior.** In the event any party or party's representative during a hearing conducts themselves in a manner determined by the ALJ to be disrespectful, and who, after having been warned once to stop, fails to stop, shall be dismissed from the hearing. If, in the ALJ's opinion, justice requires that the party be granted a continuance to obtain another representative, then it shall be granted.

200.05 Disposition without full hearing

- (A) The Board of Review or the Appeals Department may make informal disposition of any adjudicatory proceeding by default when the appealing party or the party with the burden of proof fails to appear at the scheduled hearing. A party shall be deemed to have failed to timely appear at a hearing when the party fails to appear as provided in the notice of hearing, including calling an Appeals

Department telephone number or providing in advance a telephone number as required by the notice of hearing, or by failing to be present at the telephone number provided by the party for ten (10) or more minutes past the scheduled start time of the hearing.

(B) Any such default may be set-aside by the Board of Review or Appeals Department for good cause shown. The procedure for good cause hearings is as follows:

- (1) No later than fourteen (14) days after the date of the postal or electronic mailing of the decision, upon written request setting forth the reasons for failing to appear, the Appeals Department may provide a good cause hearing to a party that failed to appear at the hearing. If the Appeals Department determines that good cause exists, it will conduct a hearing on the underlying substantive issues. Similarly, upon written request setting forth the reasons for failing to appear at a hearing, the Board of Review may provide a good cause hearing to the appealing party. A hearing on the underlying substantive issues shall be conducted only if the Board of Review determines that good cause exists.
- (2) If it is decided that a party did not have good cause for nonappearance, no evidence will be taken on the substantive issues, and the decision previously made will remain unaffected and in force.

provided to the Appeals Department, the party shall make the necessary arrangements to insure timely receipt of all correspondence from the Agency.

- (B) In any instance where a party alleges failure to receive timely notice of a hearing, or of a decision from the ALJ or Board of Review, it shall be the burden of such party to prove compliance with subsection (A) above.

209.00 Notices from the Appeals Department

Any notice of hearing, decision, or continuance properly named, addressed, and mailed by the Appeals Department and Board of Review to any interested party, and not returned by the U.S. Postal Service, shall create a rebuttable presumption of proper delivery and receipt of such notice or decision.

BENEFIT REGULATIONS

300.00 Filing Initial, Additional and Reopened Claims

The effective date of an initial claim will be the Sunday preceding the date on which the individual files a claim for benefits by any method provided by the Agency.

If the Agency determines that an individual filed their initial claim at the first available opportunity, the effective date of the claim will be the Sunday prior to the date they became unemployed.

An initial claim for benefits may be backdated to the Sunday proceeding the date the individual became