DOCKET NO. 2009-CC-01203

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND TINA L. DARBY — APPELLANTS

VS. — NO: 2009-CC-01203

TRENT L. HOWELL, PLLC — APPELLEE

APPEAL FROM THE CIRCUIT COURT

OF THE SECOND JUDICIAL DISTRICT

OF YALOBUSHA COUNTY, MISSISSIPPI

(Oral Argument Not Requested)

BRIEF OF THE APPELLEE

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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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Persons	Connection and Interest
1. Mississippi Department of Employment Security	Appellant
2. Honorable LeAnne F. Brady, Esq.	Attorney for Appellant
3. Trent L. Howell, PLLC	Appellee employer
4. Trent L. Howell, Esq.	Attorney for Appellee
5. Tina Darby	Claimant employee
6. Honorable Andrew C. Baker	Circuit Court Judge
7. Shelley B. Howell	Wife of owner, witness
8. Jennifer Sossaman	Witness for employer
9. Crystal Hale	Witness for employer
10. Mike Hill	Witness for claimant

This the 7th day of January, 2010.

TRENT L. HOWELL
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I. STATEMENT OF THE ISSUE

Tina L. Darby worked as a legal assistant for Trent Howell at first, and then for his professional limited liability company, from the time she was 18 years old until October 1, 2007, being a little over eleven years. On that date, October 1, 2007, she voluntarily quit her employment after having told her employer, in September 2007, that she would be quitting her job around Thanksgiving to move to Texas and get married. On October 9, 2007 Mrs. Darby filed for unemployment benefits, giving as her reason for quitting that she was sexually harassed.

The claims examiner did not find that Mrs. Darby had been sexually harassed as Mrs. Darby claimed; rather, the claims examiner found that she voluntarily quit her employment because of the working conditions. The claims examiner also found that Mrs. Darby failed to prove that the working conditions were a detriment to her health, safety or morals, and denied her claim. The Administrative Law Judge (ALJ) made a similar finding. She found that Mrs. Darby voluntarily quit for personal reasons. She found too that Mrs. Darby quit once before in August 2007 due to what Mrs. Darby described as inappropriate behavior on the part of Mr. Howell. The ALJ also found that during a reconciliation meeting held by Mr. and Mrs. Howell with Mrs. Darby, Mr. Howell apologized for any inappropriate behavior by him. Mrs. Darby then made the decision to continue working for the Howells. The ALJ also found that Mrs. Darby deemed later behavior by Mr. Howell as constituting more harassment. Mr. Howell denied his behavior was harassment. The ALJ concluded that Mrs. Darby's reason for quitting did not constitute good cause within the meaning of the unemployment compensation law and like the claims examiner, denied her claim.

On appeal the Board of Review reversed the decision of the ALJ. The Board adopted the findings of the ALJ and then made additional findings, including a finding that though Mr. Howell did not pursue a sexual relationship with Mrs. Darby after their reconciliation meeting in August 2007, he thereafter interfered in her personal life. The Board then concluded that a reasonable person would believe that this subsequent behavior was another form of harassment, creating an offensive work environment and giving Mrs. Darby good cause to quit.

The employer, TRENT L. HOWELL, PLLC, then appealed to the circuit court. Circuit Court Judge Andrew C. Baker reversed the decision of the Board of Review. In his Order dated March 23, 2009, he concluded, among other things, that Mr. Howell's conduct did not rise to the level of sexual harassment and did not create an offensive work environment. He further found and concluded that the decision of the Board of Review finding that Mrs. Darby had good cause to quit, was not supported by substantial evidence.

On this appeal from the Order of Circuit Court Judge Andrew C. Baker, the issue is:

> WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE DECISION OF THE BOARD OF REVIEW, BECAUSE ITS FINDING THAT THE CLAIMANT, MRS. DARBY, HAD GOOD CAUSE FOR QUITTING HER EMPLOYMENT, WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

II. STATEMENT OF THE CASE

A. Nature of the case, the course of the proceedings, and its disposition by the Circuit Court.

This is an appeal by the Mississippi Department of Employment Security (MDES) of an Order of the Circuit Court of Yalobusha County reversing a decision of the MDES Board of Review. The Board of Review had ruled that the claimant employee, Tina L. Darby (Mrs. Darby), had voluntarily quit her employment for good cause and was, therefore, entitled to unemployment benefits. The decision of the Board of Review was contrary to both that of a claims examiner and an Administrative Law Judge (ALJ). Both the ALJ and the claims examiner found that the former employee, Mrs. Darby, voluntarily quit her employment without good cause, and was therefore disqualified from receiving unemployment benefits.

In reversing the decisions of the ALJ and the claims examiner, the Board of Review adopted findings of the ALJ but then made additional findings. The Board concluded that the employer had created an offensive work environment, giving Mrs. Darby good cause to quit her employment.

In the hearing conducted telephonically by the ALJ there were two witnesses for the employee claimant. Mrs. Darby testified in her own behalf, and her fiancé, Mike Hill, testified for her. For the employer, TRENT L. HOWELL, PLLC, there were four witnesses. Trent Howell and his wife, Shelley Howell, testified for the employer, as did two of Mrs. Darby's friends, Jennifer Sossaman and Crystal Hale. Mrs. Hale identified herself as Mrs. Darby's best friend.

On the employer's appeal of the decision of the Board of Review, the Yalobusha

County Circuit Court stated that in its opinion the Board of Review failed to consider all of the evidence and its decision was not based on substantial evidence. The Circuit Court then reversed the decision of the Board of Review and reinstated that of the Administrative Law Judge, denying unemployment benefits to Mrs. Darby.

B. Statement of facts.

The Howell law office is a small single lawyer law office located in Water Valley, Mississippi. It operates under the name TRENT L. HOWELL, PLLC, a professional limited liability company that Trent Howell later formed. Its owners are Trent Howell, a local attorney, and Shelley Howell, his wife. Mrs. Howell works there as the office manager. The only other employee that the Howells had during the time giving rise to this appeal was Tina L. Darby, the employee claimant. (R. Vol. 1, p. 61, 98; R. Vol. 2, p. 148).

Mrs. Darby first began working for the Howells when she was 18 years old. She worked for them a little over eleven years as a legal assistant. (R. Vol. 1, p. 56). She was 29 years old at the time she quit. (R. Vol. 1, p. 26).

(Before August 6, 2007)

There was never any thing other than a friendship and working relationship between Trent Howell and Mrs. Darby until the spring of 2007. Mr. Howell's mother died in January 2007 and he was having trouble in his marriage and personal life. (R. Vol. 1, p. 100). Mrs. Darby had divorced her husband in early 2007. Mr. Howell and Mrs. Darby had worked closely together for years. He found himself confiding in her about his personal life and the problems he was experiencing. As Mr. Howell explained to the ALJ, he and Mrs. Darby seemed to be getting closer. She seemed to sense what he was going through; the struggle he was having with his personal problems. She began to dress a little more

revealing, and stand a little closer to him when they worked together. He testified that one day she whispered an invitation for him to come out to her house and see her some time. (R. Vol. 1, p. 100).

Mrs. Darby also teased Mr. Howell. She would telephone him saying she was going to be at a bar and invite him to join her. Then later she would text him and tell him she was just kidding (R. Vol. 2, p. 145). Mr. Howell thought Mrs. Darby was interested in more than just being friends and it made him feel good. (R. Vol. 1, p. 101). He responded to her actions with some of his own. They flirted with each other.

This mutual flirting continued for weeks, but there was no physical touching, no solicitation of sexual favors, and no off color sexual jokes or innuendos on his part. As to her flirting, Mrs. Darby later told Mrs. Howell that she was just a flirtatious person, and apparently Mr. Howell had taken it the wrong way. (R. Vol. 2, p. 158). Then one day she told Mr. Howell that if his flirting did not stop she would seek employment elsewhere. Mr. Howell testified that this is when he understood that Mrs. Darby meant it when she said she was not interested in anything other than a working relationship. He then stopped any behavior that could be construed as flirting with Mrs. Darby. (R. Vol. 1, p. 101, 103).

To assure Mrs. Darby that she need not worry about any such future behavior on his part Mr. Howell wrote her a letter in the first week of August 2007. In the letter he expressed his regret that he had almost lost her as an employee and friend. He further expressed his appreciation for her work, and he expressed his affection for her. He told her in the letter that she was an attractive woman but he realized she was not interested in him and he would not bother her. (R. Vol. 2, p. 165-167).

The letter was received by Mrs. Darby over the weekend. That Monday she

telephoned Mr. Howell while he was on his way to work. She told him she was offended by his letter and was quitting. Mr. Howell told her he did not mean to offend her and pleaded with her not to quit. He and his wife finally persuaded Mrs. Darby to meet with them and discuss her quitting, to see if the three could reconcile.

(The August 6, 2007 Reconciliation Meeting[1])

Later that same day, August 6, 2007, Trent Howell, his wife, Shelley Howell, and Mrs. Darby met in private in his office. Mr. Howell apologized to Mrs. Darby and to his wife, for his behavior toward Mrs. Darby. He told them he had been attracted to Mrs. Darby, and thought she felt the same. During this meeting Mrs. Darby acknowledged that it was not all Mr. Howell's fault; that she too was to blame. (R. Vol. 1, p. 102).[2] Mr. Howell asked Mrs. Darby to please come back to work for them. Mrs. Darby then asked Mrs. Howell how she felt about it. Mrs. Howell told her she thought they could continue working together and needed her help. (R. Vol. 2, p. 150). Mrs. Darby accepted Mr. Howell's apology and agreed to resume working for him. (R. Vol. 1, p. 63, 103).

(After August 6, 2007)

After August 6, 2007, as the Board of Review correctly found, Mr. Howell did not pursue any sort of a sexual relationship with Mrs. Darby.[3] Either late that night, August 6, 2007, or early the next morning, Mrs. Darby had a wreck and totaled her vehicle. The next day she telephoned Mr. Howell and asked him if he would drive out to her house, pick her

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[1]The August 6, 2007 meeting is hereinafter referred to as the "reconciliation meeting".

[2]Mrs. Darby, the claimant, denied having said that she too was to blame.

[3]The Board of Review incorrectly gave the date of the reconciliation meeting as August 19, 2007. It actually occurred on August 6, 2007.

up, and give her a ride to work, which he did. (R. Vol. 1, p. 77).

Totaling her vehicle gave Mrs. Darby no way to get to work. Mr. and Mrs. Howell loaned Mrs. Darby his pickup truck so she would have a way to get to and from the office. (R. Vol. 1, p. 77). They delivered it to her house for her to use. (R. Vol. 2, p. 127). She also used his pickup for personal trips. (R. Vol. 1, p 78).

In September, 2007 Mrs. Darby told Mr. Howell she would be getting married and moving to Texas. She told him she planned to leave her employment around Thanksgiving, 2007. (R. Vol. 1, p. 84-85). After announcing she was leaving the Howell law office, Mrs. Darby told a friend of hers, Jennifer Sossaman, that Mrs. Sossaman should apply for her job. (R. Vol. 1, p. 87). She told Mrs. Sossaman that Mr. Howell was a good employer and that he provided her with good job benefits. (R. Vol. 2, p. 135).

Following the August 6, 2007 reconciliation meeting, three things happened that Mrs. Darby said constituted harassment by Mr. Howell. There was a telephone call made by Mr. Howell to Mrs. Darby's dentist; an uninvited trip by Mr. Howell to her residence on or about September 14, 2007; and a telephone call made by Mr. Howell to Mrs. Darby's hairdresser on or about September 28, 2007.

(Telephone Call To Dentist)

Shortly after Mrs. Darby's August 7, 2007 car wreck, Mrs. Darby left work one day during her lunch hour to sign documents to purchase a replacement vehicle in Grenada. She was supposed to return to the office in time to pick up an office file. The file contained title work previously done on some land in Panola County. The plan was that Mrs. Darby would take the file home with her that night, then drive to Batesville from her home (which was between Water Valley and Batesville) the next morning to update the title work. Mr.

and Mrs. Howell also knew Mrs. Darby had a dental appointment later that afternoon. (R. Vol. 2, p. 150-151).

Mrs. Darby did not return to the office from Grenada that day. She did not telephone the office or tell Mr. or Mrs. Howell where she was. Consequently, she did not pick up the file at the office that she was supposed to take home with her. (R. Vol. 2, p. 150).

Dr. Barry Weeks is the dentist that Mrs. Darby had an appointment with that day. He is also a good friend of Mr. Howell. (R. Vol. 2, p. 156). That night, at Mrs. Howell's request, Mr. Howell telephoned his friend, Dr. Weeks, and asked him if Mrs. Darby had shown for her appointment. (R. Vol. 2, p. 150). Dr. Weeks told him that he could not answer his question. (R. Vol. 2, p. 122). Mrs. Darby found out about the telephone call to Dr. Weeks and registered a complaint with the Howells about it. (R. Vol. 2, p. 151).

(September 14, 2007 Trip To Claimant's House)

The Howell law office often handled lunacy cases for the county. These are cases in which persons are adjudged mentally ill and judicially committed. Mrs. Darby was the one who usually handled the lunacy cases. It was her duty to prepare the commitment papers, coordinate the proceedings, and get the interim orders signed by the judge. (R. Vol. 1, p. 103-104).

On the morning of September 14, 2007, the Howell law office had two lunacy cases pending that Mrs. Darby was coordinating. She was supposed to meet that morning with a judge to get some orders signed that the Sheriff and Communicare officials needed to continue the commitment process. (R. Vol. 1, p. 80-81, 104; R. Vol. 2, 158).

Mr. Howell had to go to Senatobia early that morning. Mrs. Howell was left manning

the office, as Mrs. Darby was supposed to be meeting with the judge before she came to the office. As the morning lapsed those interested in the lunacy case began telephoning Mrs. Howell asking where Mrs. Darby and the commitment papers were. (R. Vol. 2, p. 158-159). They said Mrs. Darby had failed to meet with the judge. Mrs. Howell had no idea where Mrs. Darby was. After the Chancery Clerk's office telephoned Mrs. Howell looking for the documents, she telephoned the courthouse in Coffeeville to see if Mrs. Darby was there. No one there had seen her. Mrs. Howell then tried to telephone Mrs. Darby. She tried her home telephone number and there was no answer. She tried her cell phone number and there was no answer. (R. Vol. 1, p. 81, 104; Vol. 2, p. 159). Exasperated, she telephoned Mr. Howell, who was then on his way back from Senatobia. Mrs. Howell asked him if he had heard from Mrs. Darby and he said he had not. Mrs. Howell explained the situation to him. He agreed to stop by Mrs. Darby's house on his way back to the office to see if she was there, and to find out what had happened to her. (R. Vol. 1, p. 104).

When he reached Mrs. Darby's house, Mr. Howell saw her vehicle parked in the driveway. He went to her porch and knocked on the door. After a few moments Mrs. Darby came to the door and let Mr. Howell in her house.

Mr. Howell first began to question her as to why she had failed to meet with the judge and why she had failed to telephone the office or answer her telephone. Mrs. Darby gave no response. She offered no excuse. She showed no remorse. (R. Vol. 1, p. 104-105). A few minutes later, Mike Hill, the claimant's boyfriend at the time, walked out of the bedroom. He stood there as Mr. Howell and Mrs. Darby exchanged words.

Mr. Howell asked Mrs. Darby to turn over his files that were needed that morning. She went to her vehicle to retrieve them and it was locked. She then went back into the

house to get her keys. She found her keys and unlocked the door to her vehicle. She then handed Mr. Howell the files and he left. (R. Vol. 1, p. 105-106).

During the time Mr. Howell was at Mrs. Darby's house he, in his words, "chewed her out", about her behavior, those whom she had let down, and the lifestyle she was living. (R. Vol. 1, p. 105). Just what Mr. Howell said to Mrs. Darby is in dispute. In the hearing with the ALJ she accused him of making derogatory remarks about her boyfriend. Mr. Howell denied making any remarks directed at Mr. Hill. (R. Vol. 1, p. 109). What is not in dispute, however, is that Mrs. Darby was not where she was supposed to be that morning and while Mr. Howell was there, Mrs. Darby ordered him to get the "f___ out" of her house, and get the "f____ out" of her yard. (R. Vol. 1, p. 83). Mr. Howell was asked by the ALJ why he made any comment to Mrs. Darby about the lifestyle she was living. In response Mr. Howell explained that her lifestyle was the reason she had not come to work. (R. Vol. 1, p. 107).

About two hours after Mr. Howell got his files and left from Mrs. Darby's house, Mrs. Darby telephoned him. For about ten minutes she apologized profusely. She told Mr. Howell she knew she had been messing up and letting Mr. and Mrs. Howell down. She told him she knew she was not doing what she should be doing. She told him she was not proud of herself, even did not like herself. She told Mr. Howell she loved her job and did not want to lose it. (R. Vol. 1, p. 83, 110). In response to the question of the ALJ as to why she felt the need to apologize if the behavior of Mr. Howell offended her so much, Mrs. Darby said it was because she did not want to lose her job. But she then admitted that Mr. Howell did not tell her that her job was in jeopardy. (R. Vol. 1, p. 86). Upon further questioning by the ALJ Mrs. Darby said she thought she was in danger of losing her job

because she had told Mr. Howell to get the "f__ out" of her house and yard. (R. Vol. 1, p. 86-87).

The following Monday Mrs. Darby came to the office and apologized again. She was allowed to resume working but Mrs. Howell informed her of some changes that had to be made. Thereafter Mrs. Darby was expected to be punctual; limit the use of her cell phone; and carry out assigned duties daily. (R. Vol. 1, p. 40; R. Vol. 2, p. 151). It was after the incident at her house that Mrs. Darby told Mr. Howell she was going to marry Mike Hill and move to Texas around Thanksgiving 2007. Thereafter things went well at the Howell law office until September 28, 2007.

(Telephone Call To Hairdresser)

Days before the weekend of September 28, 2007, Mrs. Darby had requested and been given permission to leave early from work that Friday afternoon to drive to Texas with her fiancé. That Thursday she was overheard by the Howells saying she was going to go to the bar that night. (R. Vol. 1, p. 112).

The next morning Mrs. Darby telephoned the Howells before they left for work. She spoke to Mrs. Howell and told her she was sick and would not be coming to work. Mr. and Mrs. Howell were not surprised by Mrs. Darby's telephone call. When she said she was going out the night before, and knowing that she planned to leave work early the next day, both Mr. and Mrs. Howell expected her to call in sick. (R. Vol. 2, p. 152). The timing of her call made them suspicious, as by then they did not trust her. (R. Vol. 1, p. 113; R. Vol. 2, p. 156). Then Mr. Howell thought he saw her vehicle in town. He knew Mrs. Darby had also mentioned wanting to see her hairdresser, Mike Redwine, before she left town that weekend. Suspicious because of the timing of Mrs. Darby's call in sick, and thinking he

had seen her vehicle in town, Mr. Howell telephoned the hairdresser and asked if he had seen Mrs. Darby. He said he had not and the conversation ended. (R. Vol. 1, p. 113). Mr. Redwine is also Mr. Howell's hairdresser. (R. Vol. 2, p. 158).

(October 1, 2007–Day Claimant Quit)

Things started out as usual at the Howell law office on the morning of October 1, 2007. About mid-morning, though, Mr. Howell asked Mrs. Darby to step into his office as he had something he wanted to discuss with her.

Mrs. Darby came in and sat down. Mr. Howell told her that she had been making mistakes she ordinarily would not make if she was concentrating on her work. He told her he knew she was distracted, and that was understandable. He told her anyone in her position would be distracted because of her upcoming wedding and her moving to Texas. He told her he understood she was distracted, but he needed her to remain focused, to give him 100% until she left. (R. Vol. 1, p. 115-116).

Mrs. Darby became defensive. She questioned what mistakes he was referring to. Mr. Howell tried to calm her down. He told her he was not trying to make her mad or pick a fight. Mrs. Darby told him they would not even be having this conversation if it were not for her going with Mike Hill. Mr. Howell asked her what she was talking about. (R. Vol. 1, p. 116).

Mrs. Darby hurriedly left his office and went up the hall and into Mrs. Howell's office. She closed the door behind her and began to tell Mrs. Howell about things that occurred before their August 6, 2007 reconciliation meeting. She also told her that Mr. Howell telephoned her hairdresser, Mike Redwine.

About this time Mr. Howell walked in. Mrs. Howell asked him if he had telephoned

Mike Redwine and asked him if he had seen Mrs. Darby. He said he had. Mrs. Howell told him not to do that anymore. (R. Vol. 2, p. 154). Mrs. Darby then left the room saying she was going to lunch. She telephoned later and said she was not returning to work. (R. Vol. 1, p. 117).

A few days later she returned and picked up her personal things which Mr. and Mrs. Howell had boxed up for her. As Mr. Howell placed the last box into Mrs. Darby's vehicle he told her that if her fiancé were standing there with them, he would tell Mrs. Darby and her fiancé that he wished them happiness and much success in life. (R. Vol. 2, p. 131-132). On October 9, 2007 Mrs. Darby filed for unemployment benefits.

III. SUMMARY OF THE ARGUMENT

The employer, Mr. Howell, never harassed the claimant, Mrs. Darby, sexually or otherwise. Nothing about his behavior gave her good cause to quit her job. Rather, she had decided before many of the incidents complained of that she was going to quit and move to Texas to marry her fiancé. The employer did not want her to quit and he and his wife told her they needed her help. Her quitting put them in a bind, as they had not planned on her quitting for about another two months and needed her to work. She left a good job; not because of anything her employer did, but because she was tired of working and wanted to be with her fiancé.

Contrary to the position taken by the appellant MDES and the findings of the Board of Review, the actions of Mrs. Darby, the claimant, were not those of an ordinary prudent employee. A reasonable prudent person would not have believed they were being harassed, and Mr. Howell did not create an offensive work environment, as the Board of Review incorrectly concluded. His actions constituted no form of harassment. Rather, the claimant herself caused or certainly contributed to any unpleasantness she felt in the law office. She became derelict in her duties and overreacted to reasonable acts on the part of her employer.

The Board of Review appears to have scanned the record with one eye shut, as a careful reading of the record, and a consideration of the totality of the evidence and circumstances, as was done by the Circuit Court, not only supports the decision reached by both the claims examiner and the ALJ, but requires it. Therefore, this Honorable Court should affirm the decision of the Circuit Court.

IV. THE ARGUMENT

A. *Standard of Review*

Section 71-5-531 of the Mississippi Code governs the standard of review for appealing a Mississippi Department of Employment Security Board of Review decision to the circuit court and the Mississippi Supreme Court. Hodge v. Miss. Emp. Sec. Comm'n, 757 So. 2d 268 (Miss. 2000). According to Section 71-5-531 the findings of the Board of Review are conclusive, if supported by evidence and in the absence of fraud. But the type of evidence required to make the Board of Review's findings conclusive is *substantial* evidence. Allen v. Miss. Emp. Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994) (emphasis added). "Substantial evidence" is that which is relevant and capable of supporting a reasonable conclusion, or more than a mere scintilla of evidence. Gilbreath v. Miss. Emp. Sec. Comm'n, 910 So. 2d 682, 686 (Miss. App. 2005). Further, a decision that is not based on substantial evidence is arbitrary and capricious. Gilbreath, 910 So. 2d at 686. And, a ruling is not based on substantial evidence "if glaringly obvious evidence is ignored." Univ. of Miss. Med. Ctr. v. Pounders, 970 So. 2d 141, 147 (Miss. 2007).

B. *The MDES Board of Review finding that the claimant voluntarily quit her employment for good cause is not supported by substantial evidence; therefore, the Circuit Court properly reversed the Board's decision to grant unemployment benefits to the claimant.*

Section 71-5-513 of the Mississippi Code provides in part that a claimant seeking unemployment benefits is disqualified if she voluntarily quits her employment without good cause. Moreover, the burden of proving good cause for quitting one's employment is on the claimant. Miss. Code Ann. §71-5-513 (A)(1)(c).

It is undisputed that Mrs. Darby, the claimant, voluntarily quit her job against the

wishes and over the request of her employer. What is disputed is whether or not she had good cause to do so. The MDES contends she proved harassment, giving her good cause to quit, and then did quit, as any reasonable employee would do. The employer appellee denies the allegations of harassment, and contends the claimant quit because she no longer liked working for her employer and had decided to move to Texas and get married. The employer also denies that he made the working conditions so intolerable that quitting was a reasonable act on the part of the claimant.

The Board of Review found that the employer interfered in Mrs. Darby's personal life by telling her she should not marry her fiancé; by questioning her about how she spent her personal time; and by attempting to keep up with or find out about her personal life. (R.E. 7). The Board deemed the alleged interference as "harassment" or that it was reasonable to believe it was. As one example in support of its findings the Board recounted the time in September, 2007 when the employer went to Mrs. Darby's residence and found her there with her boyfriend when she was supposed to have worked that morning. The Board accepted the testimony of Mrs. Darby and of her later fiancé as to what Mr. Howell said during that episode, and ignored the testimony given by Mr. Howell. Moreover, the Board ignored the dereliction of duty on the part of the claimant. The fact that she failed to perform an important task as part of her job and failed to telephone the office or answer her telephone was of no significance. It was not mentioned by the Board.

Mrs. Darby admitted that on the morning Mr. Howell came to her residence for his files, she was supposed to have taken the files that morning and gotten the signature of a judge on some lunacy orders. (R. Vol. 1, p. 80-81). She admitted that she did not telephone the office, did not answer her telephone, and did not let her employer and his

wife know what had become of her. (R. Vol. 1, p. 81-82). She admitted she used vulgarities in telling Mr. Howell to leave her house and yard. (R. Vol. 1, p. 83).

Mr. Howell testified that he went to Mrs. Darby's residence to see if he could find Mrs. Darby as she was not where she was supposed to be and had not reported to the office or answered her telephone. He did not know what had happened to her. His wife telephoned him while he was on his way back from Senatobia and told him Mrs. Darby was missing. He then agreed to stop at her house to check on her as it was on his way back to the office. (R. Vol. 1, p. 103-106). He testified that Mrs. Darby gave no excuse for neglecting her duty and not reporting to work. (R. Vol. 1, p. 104-105). He testified that he "chewed her out" about her behavior, those she had let down, and the lifestyle she was leading. (R. Vol. 1, p. 105). As he explained to the ALJ he mentioned her lifestyle, because the lifestyle she had begun living was the reason she did not come to work. (R. Vol. 1, p. 107). Mr. Howell also denied making derogatory comments about the fiancé. As he explained, he did not care what she did during her private time, as long as it did not affect the business. (R. Vol. 1, p. 108-109).

The Board of Review failed to mention the real reason Mr. Howell went to Mrs. Darby's home that morning. The Board also failed to mention the fact that Mrs. Darby apologized over the telephone later to Mr. Howell. And during that telephone call she said she loved her job and knew she had been messing up and letting Mr. and Mrs. Howell down. (R. Vol. 1, p. 83). The ALJ picked up on this apology. The ALJ questioned Mrs. Darby as to why she felt the need to apologize if Mr. Howell's behavior offended her so much. (R. Vol. 1, p. 86). Mrs. Darby's explanation was essentially that she was not sincere; she just said it to keep her job. (R. Vol. 1, p. 87). She knew she had done wrong. She

knew she could have been fired for her dereliction of duty that morning. How would a reasonable employer have reacted to what his employee had done that morning? Wouldn't he have been justified in firing her on the spot? But Mr. Howell did not do that. As he explained, he and his wife cared about Mrs. Darby. She had worked for them for over ten years. (R. Vol. 1, p. 105, 108).

The Board of Review seems to have completely overlooked the apology made by Mrs. Darby and the significance placed on it by the ALJ. It seemed to have ignored the employer's version of what took place, what he said, and the context in which it was said, although it was glaringly obvious. And a decision that ignores glaringly obvious evidence, is a ruling not based on substantial evidence. Univ. of Miss. Med. Ctr. v. Pounders, 970 So. 2d 141, 147 (Miss. 2007).

The Circuit Court grasped the situation. In his Order Judge Baker noted that Mr. Howell had an important reason to go to Mrs. Darby's residence that morning in September, 2007. (R.E. 10). But for Mrs. Darby failing to carry out her job assignment of meeting with a judge that morning as she was supposed to, and but for her having failed to telephone the office or answer her telephone, Mr. Howell would never have gone to her residence. It was Mrs. Darby, not Mr. Howell, that was responsible for what happened at her residence.

In accepting Mrs. Darby's version the Board of Review gave credence to the testimony of Mike Hill, the fiancé. (R.E. 7). In doing so the Board overlooked the contradiction of his testimony by that of the other witnesses, including that of Mrs. Darby. Mr. Hill testified that the reason Mrs. Darby failed to show up for work on the morning Mr. Howell went to her residence, was because she was sick, so sick she could not answer her

telephone. He also testified that she telephoned Mrs. Howell that morning and told her she was sick. (R. Vol. 1, p. 94-95). Mrs. Darby never gave as an excuse that she was sick. She never gave any excuse, according to the testimony of Mr. Howell, Mrs. Howell, and importantly, that of Mrs. Darby's best friend, Crystal Hale. (R. Vol. 1, p. 105; R. Vol. 2, p. 144, 159). Even Mrs. Darby herself never testified that she was sick and gave that as the reason she failed to show up for work. She did admit, however, that she never telephoned the office and never let her employer or his wife know where she was. (R. Vol. 1, p. 81). That testimony is directly contrary to that of Mike Hill. Because of that, and his obvious bias, his testimony was not worthy of belief, yet the Board of Review relied upon it in making its findings.

The Board of Review also stated in its opinion that Mr. Howell interfered in Mrs. Darby's personal life by telephoning her hairdresser. (R.E. 8). The Board did not, however, mention or place any emphasis on the explanation given by Mr. and Mrs. Howell for the telephone call to the hairdresser. (R. Vol. 1, p. 112-114; R. Vol. 2, p. 151-152). Also, Mr. Howell only asked if Mr. Redwine, the hairdresser, had seen Mrs. Darby. He said no, and the conversation ended. (R. Vol. 1, p. 113). Nothing else was said. There were no derogatory remarks made. No ugly suggestive comments. Under the circumstances there was nothing unreasonable about Mr. Howell telephoning and asking if the hairdresser had seen Mrs. Darby. If he had made comments or stated more, he might have crossed the line, but he did not. His reason for making the call was legitimate and certainly was not a form of harassment and the Circuit Court correctly so found. (R.E. 11).

The same thing applies to the telephone call Mr. Howell made to his dentist friend, Dr. Weeks. Mr. Howell just asked if he had seen Mrs. Darby. Dr. Weeks and his wife said

they could not answer that question and the telephone conversation ended. There were no derogatory remarks made by Mr. Howell. Nothing ugly was stated. He did not cross the line in simply asking if Dr. Weeks had seen her. Mr. Howell's actions were completely reasonable. Moreover, he made the telephone call at his wife's request. (R. Vol. 2, p. 150). The Howells were looking for Mrs. Darby because she was supposed to have returned to the office that afternoon to retrieve a file. She did not return and did not telephone. Again, the Howells had no idea what had become of her. But they knew she had a dental appointment that day. The telephone call to the dentist was therefore, completely reasonable. It was not harassment or an act of interfering in Mrs. Darby's life. And if Mrs. Darby had done as she was supposed to, or simply telephoned the office, the inquiry of the dentist would never have been made.

The alleged "harassment" is said to have occurred both before August 6, 2007 and after August 6, 2007. On that date is when the three, Mrs. Darby, Mr. Howell and Mrs. Howell's wife, Shelley Howell, met and Mr. Howell apologized and the three reconciled.

Noteworthy, Mrs. Darby labels both the behavior before and after August 6, 2007 as being sexual harassment. But the claims examiner, the ALJ and the Board of Review, never labeled Mr. Howell's behavior as sexual harassment. (R.E. 3, 4, 7). And the Board of Review correctly found that Mr. Howell did not pursue a sexual relationship after the August 2007 reconciliation meeting. Nor could there have been a finding that Mr. Howell sexually harassed the claimant, Mrs. Darby. As the Circuit Court amply noted, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature when: (1) submission to such conduct is made a condition of continued employment; (2) submission to or rejection of such conduct

is used as the basis for employment decisions affecting the employee; or (3) such conduct has as its purpose or effect the creation of an offensive work environment. (R.E. 11). In making this statement the Circuit Court cited Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326 (S.D. Miss. 1986). As the Circuit Court properly found, there was no affair; no request for sexual favors; no inappropriate touching; no expression in verbal terms or words that was inappropriate. And there was no evidence of any conduct by Mr. Howell that he placed any conditions on the claimant's continued employment. (R.E. 11). Mrs. Darby never testified otherwise. The most she said was that Mr. Howell tried to hug her and tried to hold her hand, which Mr. Howell denied. And she testified in general terms to conversations they had before August 6, 2007 that she interpreted as being inappropriate and suggestive.

The Board of Review concluded that "a reasonable prudent person would believe that Mr. Howell's behavior was a continuation of, or another form of harassment, creating an offensive work environment." (R.E. 8). The Circuit Court found otherwise. He found that the conduct of Mr. Howell did not create an offensive work environment. (R.E.11).

In Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) the Court stated, "[C]onsidering plaintiff's contribution to and apparent enjoyment of the situation, it cannot be said that the defendants created an ... offensive working environment." In the instant case there was testimony that Mrs. Darby too was at fault for what she later described as inappropriate behavior on the part of Mr. Howell. Mr. Howell testified that at the reconciliation meeting of August 6, 2007, Mrs. Darby confessed that she too was at fault. (R. Vol. 1, p. 102). Her best friend, Crystal Hale, testified that Mrs. Darby teased Mr. Howell, by inviting him to bars and then later texting him and saying she

did not mean it. (R. Vol. 2, p. 144-145). Even Mrs. Darby admitted she was flirtatious. (R. Vol. 2, p. 158). She also admitted that she had been "messing up" and letting the Howells down. (R. Vol. 1, p. 83).

Just like Mr. Howell said, there was a mutual flirting between he and Mrs. Darby, but which ended on August 6, 2007. After that there were three main things claimed by Mrs. Darby to be harassment: (1) the telephone call to the dentist; (2) the trip to Mrs. Darby's residence; and (3) the telephone call to the hairdresser. All three of these incidences were precipitated by Mrs. Darby herself. Had she returned to the office and retrieved the files as she was supposed to, or bothered to telephone the office, the dentist would not have been telephoned. Had she met with the judge to have the lunacy orders signed on the morning she was supposed to, or bothered to telephone the office or answer her telephone, Mr. Howell would never have gone to her residence. Had she been more trustworthy about her reason for not coming to work, Mr. Howell would never have telephoned the hairdresser.

If the office atmosphere had become unpleasant, hostile or offensive, it was not because of Mr. Howell's conduct. It was because of Mrs. Darby's conduct, or at least, she directly contributed to such. The Circuit Court was correct in determining that the evidence did not support a finding that Mr. Howell created an offensive work environment. Had the work environment really been offensive to Mrs. Darby she would not have told Mr. Howell in her apology following his trip to her residence, that she loved her job. (R. Vol. 1, p. 83). She also would not have encouraged her friend, Jennifer Sossaman, to apply for the job, or told Ms. Sossaman that her employer, Mr. Howell, was a good employer. (R. Vol. 2, p. 135).

C. *The claimant's reactions to her employer's conduct after August 6, 2007, were not reasonable, and a reasonably prudent employee would not have felt compelled to quit.*

The appellant MDES cites the case of Hoerner Boxes, Inc. v. Miss. Emp. Sec. Comm'n, 693 So. 2d 1343 (Miss. 1997). Hoerner Boxes was a true sexual harassment case. This is not. Thus, Hoerner Boxes does not apply.

In Hoerner Boxes the female claimant presented evidence that a male co-worker inappropriately touched her and a female co-worker. He placed his hands on her breast. Hoerner Boxes, 693 So. 2d at 1345. Evidence was given of derogatory sexual remarks and bodily gestures at the workplace. Hoerner Boxes, 693 So. 2d at 1345. That was not the case at the Howell law office. There was no inappropriate touching, no sexual remarks or innuendos. Nothing of a sexual nature was said by Mr. Howell. The letter of August 6, 2007 was a private communication sent by Mr. Howell to Mrs. Darby, not a public one meant to cause embarrassment to her. And nothing like that happened after August 6, 2007 as the Board of Review did correctly find.

Hoerner Boxes is a constructive discharge case. Mississippi law defines "constructive discharge" as deemed to have resulted when the employer made conditions *so intolerable* that the employee reasonably felt compelled to resign. Cothern v. Vickers, Inc. 759 So. 2d 1241, 1246 (Miss. 2000) (emphasis added).

The working conditions at the Howell law office were not intolerable. If they were, Mrs. Darby would not have told her employer she loved her job. She would not have encouraged her friend, Jennifer Sossaman, to apply for her job when she left. She would not have bragged to her friend, Jennifer Sossaman, that Mr. Howell was a good employer. And she would not have offered to train her friend for the job. (R. Vol 2, p. 135).

The Howells wanted Mrs. Darby, who had worked for them for eleven years and who was once a trusted employee, to continue working for them. They needed her. They befriended her. After she wrecked her vehicle following the reconciliation meeting of August 6, 2007, she telephoned Mr. Howell and asked if he would pick her up and give her a ride to work. He did. (R. Vol. 1, p. 77). The Howells then loaned her their vehicle to have as a means of getting to and from work. (R. Vol. 1, p. 77). They helped her. They tried to keep her as an employee. But just as she told her best friend, she had already decided to quit long before what she gave as her reason for quitting. (R. Vol. 2, p. 135-136, 145).

Mrs. Darby presented no medical records or testimony that mentally or physically she was suffering from her working conditions, as was done in Washington v. Miss. Emp. Sec. Comm'n, 921 So. 2d 390 (Miss. App. 2005). Despite the evidence presented in the Washington case, the claimant failed to show good cause for voluntarily leaving her employment and she was denied benefits.

In Hudson v. Miss. Emp. Sec. Comm'n, 869 So. 2d 1065 (Miss. App. 2004) the employee claimed that he was being harassed at work, causing his health to deteriorate. He told his job foreman that he "could not take it anymore and that he could not stay under the circumstances." Hudson, 869 So. 2d at 1067. He presented medical records supporting his claim, coupled with his own testimony. Nevertheless, the Court affirmed a decision that the employee failed to prove good cause for leaving his employment.

In the instant case the claimant, Mrs. Darby, told her best friend, Mrs. Hale, that she could not take it any more. (R. Vol. 2, p. 135). But she did not tell her employer that. And she did not tell her best friend anything specifically that Mr. Howell supposedly did. Also, unlike the employee in Hudson, she presented no medical records supporting her claim.

The facts supporting harassment and good cause for quitting were stronger in the Hudson case than in the instant case, yet the employee's claim was found to have been properly denied. In the Hudson case the employer did not even call any witnesses to testify; rather, the only witness before the appeals referee was the employee himself. Hudson, at 1068. In the instant case the employer presented four witnesses, two of whom were friends of Mrs. Darby, and one of whom was her best friend. Mrs. Darby, on the other hand, only called two witnesses. She testified and her fiancé testified. His testimony was not believable as he was obviously biased and he did not tell the truth as has been shown.

Unemployment benefits are available for employees who leave their employment involuntarily *through no fault of their own*. Hudson, 869 So. 2d at 1067. (emphasis added). Mrs. Darby was at fault. See also Landgraf v. USI Film Products, 968 F. 2d 427 (5th Cir. 1992) (sexually harassed employee's constructive discharge claim dismissed as matter of law because reasonable employee would not have felt compelled to resign.)

V. CONCLUSION

The claimant voluntarily quit her employment because she was tired of working for the Howells and planned to move to Texas to marry her fiancé. The record amply reflects such.

The working conditions were not offensive or hostile, and if they had become unpleasant or tense, it was either Mrs. Darby's fault, or she was partly to blame. Either way, Mr. Howell did not create such. Furthermore, the conditions were not so uncomfortable that a reasonable employee would have felt compelled to quit their employment, thus there was no constructive discharge of Mrs. Darby.

The Board of Review, as the Circuit Court correctly recognized, failed to consider the record as a whole and the totality of the evidence and circumstances, such as the nature of the claimed offensive conduct and the context in which it occurred. The Board of Review failed to recognize that which was obvious, this is not a sexual harassment case or any other sort of harassment case. Rather, this is a case of a burned out employee who had begun observing a lifestyle that was not conducive to her remaining a good employee. She chose this lifestyle and moving to Texas, rather than remaining in the employ of the Howells. And with her training as a legal assistant for eleven years she knew just what to claim and charge to help her get the unemployment benefits that she was not entitled to, at her former friends' expense.

The Circuit Court saw the truth behind her facade. It is respectfully requested that the decision of the Circuit Court be affirmed.

CERTIFICATE OF SERVICE

I, Trent L. Howell, on behalf of the defendant Appellee, TRENT L. HOWELL, PLLC, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to the following person:

Honorable LeAnne F. Brady
Counsel of record for the Appellant, MDES
Mississippi Department of Employment Security
P. O. Box 1699
Jackson, MS 39215-1699

This the 7th day of January, 2010.

Trent L. Howell
TRENT L. HOWELL

ADDENDUM

MISS. CODE ANN. § 71-5-513

MISS. CODE ANN. § 71-5-531

§ 71-5-513. Disqualifications [Repealed effective July 1, 2010].

A. An individual shall be disqualified for benefits:

(1)(a) For the week, or fraction thereof, which immediately follows the day on which he left work voluntarily without good cause, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case; however, marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this subsection. Pregnancy shall not be deemed to be a marital, filial or domestic circumstance for the purpose of this subsection.

(b) For the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case.

(c) The burden of proof of good cause for leaving work shall be on the claimant, and the burden of proof of misconduct shall be on the employer.

(2) For the week, or fraction thereof, with respect to which he willfully makes a false statement, a false representation of fact, or willfully fails to disclose a material fact for the purpose of obtaining or increasing benefits under the provisions of this law, if so found by the department, and such individual's maximum benefit allowance shall be reduced by the amount of benefits so paid to him during any such week of disqualification; and additional disqualification shall be imposed for a period not exceeding fifty-two (52) weeks, the length of such period of disqualification and the time when such period begins to be determined by the department, in its discretion, according to the circumstances in each case.

(3) If the department finds that he has failed, without good cause, either to apply for available suitable work when so directed by the employment office or the department, to accept suitable work when offered him, or to return to his customary self-employment (if any) when so directed by the department, such disqualification shall continue for the week in which such failure occurred and for not more than the twelve (12) weeks which immediately follow such week, as determined by the department according to the circumstances in each case.

(a) In determining whether or not any work is suitable for an individual, the department shall consider among other factors the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence; however, offered employment paying the minimum wage or higher, if such minimum or higher wage is that prevailing for his customary occupation or similar

work in the locality, shall be deemed suitable
benefits have been paid to
(b) Notwithstanding
shall be deemed suitable
chapter to any otherwise
work under any of the fol
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or other labor dispute;
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work in the locality, shall be deemed to be suitable employment after benefits have been paid to the individual for a period of eight (8) weeks.

(b) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(i) If the position offered is vacant due directly to a strike, lockout or other labor dispute;

(ii) If the wages, hours or other conditions of the work offered are substantially unfavorable or unreasonable to the individual's work. The department shall have the sole discretion to determine whether or not there has been an unfavorable or unreasonable condition placed on the individual's work. Moreover, the department may consider, but shall not be limited to a consideration of, whether or not the unfavorable condition was applied by the employer to all workers in the same or similar class or merely to this individual;

(iii) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(iv) If unsatisfactory or hazardous working conditions exist that could result in a danger to the physical or mental well-being of the worker. In any such determination the department shall consider, but shall not be limited to a consideration of, the following: the safety measures used or the lack thereof and the condition of equipment or lack of proper equipment. No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity.

(4) For any week with respect to which the department finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at a factory, establishment or other premises at which he is or was last employed; however, this subsection shall not apply if it is shown to the satisfaction of the department:

(a) He is unemployed due to a stoppage of work occasioned by an unjustified lockout, if such lockout was not occasioned or brought about by such individual acting alone or with other workers in concert; or

(b) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and

(c) He does not belong to a grade or class of workers of which, immediately before the commencement of stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute.

If in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the

purposes of this subsection, be deemed to be a separate factory, establishment or other premises.

(5) For any week with respect to which he has received or is seeking unemployment compensation under an unemployment compensation law of another state or of the United States. However, if the appropriate agency of such other state or of the United States finally determines that he is not entitled to such unemployment compensation benefits, this disqualification shall not apply. Nothing in this subsection contained shall be construed to include within its terms any law of the United States providing unemployment compensation or allowances for honorably discharged members of the Armed Forces.

(6) For any week with respect to which he is receiving or has received remuneration in the form of payments under any governmental or private retirement or pension plan, system or policy which a base-period employer is maintaining or contributing to or has maintained or contributed to on behalf of the individual; however, if the amount payable with respect to any week is less than the benefits which would otherwise be due under Section 71-5-501, he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration. However, on or after the first Sunday immediately following July 1, 2001, no social security payments, to which the employee has made contributions, shall be deducted from unemployment benefits paid for any period of unemployment beginning on or after the first Sunday following July 1, 2001. This one hundred percent (100%) exclusion shall not apply to any other governmental or private retirement or pension plan, system or policy. If benefits payable under this section, after being reduced by the amount of such remuneration, are not a multiple of One Dollar ($1.00), they shall be adjusted to the next lower multiple of One Dollar ($1.00).

(7) For any week with respect to which he is receiving or has received remuneration in the form of a back pay award, or other compensation allocable to any week, whether by settlement or otherwise. Any benefits previously paid for weeks of unemployment with respect to which back pay awards, or other such compensation, are made shall constitute an overpayment and such amounts shall be deducted from the award by the employer prior to payment to the employee, and shall be transmitted promptly to the department by the employer for application against the overpayment and credit to the claimant's maximum benefit amount and prompt deposit into the fund; however, the removal of any charges made against the employer as a result of such previously paid benefits shall be applied to the calendar year and the calendar quarter in which the overpayment is transmitted to the department, and no attempt shall be made to relate such a credit to the period to which the award applies. Any amount of overpayment so deducted by the employer and not transmitted to the department shall be subject to the same procedures for collection as is provided for contributions by Sections 71-5-363 through 71-5-381. Any amount of overpayment not deducted by the employer shall be established as an overpayment against the

claimant and collected as pr
to assure equity in the si
construed accordingly.

B. Notwithstanding any
eligible individual shall be d
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71-5-511, subsection (c), relat
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accept, suitable work.

C. Notwithstanding any
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For purposes of this sectio
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the Trade Act of 1974), and w
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of the Trade Act of 1974.

SOURCES: Codes, 1942, § 7
Laws, 1954, ch. 353, § 2;
Laws, 1971, ch. 519, § 5;
Laws, 1983, ch. 364, § 4;
Laws, 1988, ch. 365; Law
2001, ch. 405, § 1; Law
reenacted without chan
and after July 1, 2008.

Editor's Note — Laws, 200
ch. 30, § 58, provides:
"SECTION 60. This act shal
Amendment Notes — The
The 2004 amendment subst
stylistic changes throughout.
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The 2008 amendment reena

1. In general.
2. Burden of proof.
5. Leaving employment wi
cause.

claimant and collected as provided above. It is the purpose of this paragraph to assure equity in the situations to which it applies, and it shall be construed accordingly.

B. Notwithstanding any other provision in this chapter, no otherwise eligible individual shall be denied benefits for any week because he is in training with the approval of the department; nor shall such individual be denied benefits with respect to any week in which he is in training with the approval of the department by reason of the application of provisions in Section 71-5-511, subsection (c), relating to availability for work, or the provisions of subsection A(3) of this section, relating to failure to apply for, or a refusal to accept, suitable work.

C. Notwithstanding any other provisions of this chapter, no otherwise eligible individual shall be denied benefits for any week because he or she is in training approved under Section 236(a) (1) of the Trade Act of 1974, nor shall such individual be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law (or any applicable federal unemployment compensation law), relating to availability for work, active search for work or refusal to accept work.

For purposes of this section, the term "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment (as defined for purposes of the Trade Act of 1974), and wages for such work at not less than eighty percent (80%) of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974.

SOURCES: Codes, 1942, § 7379; Laws, 1940, ch. 295; Laws, 1944, ch. 288, § 1; Laws, 1954, ch. 353, § 2; Laws, 1958, ch. 533, § 3; Laws, 1962, ch. 564, § 1; Laws, 1971, ch. 519, § 5; Laws, 1977, ch. 497, § 8; Laws, 1982, ch. 480, § 3; Laws, 1983, ch. 364, § 4; Laws, 1984, ch. 498, § 3; Laws, 1986, ch. 316, § 2; Laws, 1988, ch. 365; Laws, 1994, ch. 303, § 4; Laws, 1996, ch. 464, § 3; Laws, 2001, ch. 405, § 1; Laws, 2004, ch. 572, § 39; Laws, 2007, ch. 606, § 14; reenacted without change, Laws, 2008, 1st Ex Sess, ch. 30, § 39, eff from and after July 1, 2008.

Editor's Note — Laws, 2004, ch. 572, § 60, as amended by Laws, 2008, 1st Ex Sess, ch. 30, § 58, provides:

"SECTION 60. This act shall stand repealed July 1, 2010."

Amendment Notes — The 2001 amendment rewrote A.(6).

The 2004 amendment substituted "department" for "commission" and made minor stylistic changes throughout.

The 2007 amendment rewrote A.(3)(b)(ii) and added A.(3)(b)(iv).

The 2008 amendment reenacted the section without change.

JUDICIAL DECISIONS

1. In general.
2. Burden of proof.
5. Leaving employment without good cause.
7. Misconduct discharge, generally.
8. — Held disqualification.
9. —Held not disqualification.
10. Late notice of appeal.

JUDICIAL DECISIONS

1. Untimely appeal.
1.5. — Standard of Review.

1. Untimely appeal.

1.5. — Standard of Review.

Employer filed for appeal from the decision of the Board of Review of the Mississippi Employment Security Commission, more than two weeks after the statutory deadline and apparently, based on the circuit court's decision to deny the Commission's motion to dismiss, demonstrated the requisite "good cause" for the untimely filing. However, the appellate court was left to assume that fact since the transcripts were not to be found, and further review of the record revealed an absence of any evidence that might have supported a finding of good cause; thus, the employer's failure to provide such evidence, when viewed under the present law and the appellate court's standard of review, required reversal of the circuit court's decision ordering a new hearing on behalf of the employer. Miss. Empl. Sec. Comm'n v. Gilbert Home Health Agency, 909 So. 2d 1142 (Miss. Ct. App. 2005).

§ 71-5-531. Court review [Repealed effective July 1, 2010].

Within ten (10) days after the decision of the Board of Review has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action, in the circuit court of the county in which the plaintiff resides, against the department for the review of such decision, in which action any other party to the proceeding before the Board of Review shall be made a defendant. In cases wherein the plaintiff is not a resident of the State of Mississippi, such action may be filed in the circuit court of the county in which the employer resides, the county in which the cause of action arose, or in the county of employment. In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served upon the department or upon such person as the department may designate, and such service shall be deemed completed service on all parties; but there shall be left with the party so served as many copies of the petition as there are defendants, and the department shall forthwith mail one (1) such copy to each such defendant. With its answer, the department shall certify and file with said court all documents and papers and a transcript of all testimony taken in the matter, together with the Board of Review's findings of fact and decision therein. The department may also, in its discretion, certify to such court questions of law involved in any decision. In any judicial proceedings under this section, the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions, and the questions so certified, shall be heard in a summary manner and shall be given precedence over all other civil cases. An appeal may be taken from the decision of the circuit court of the county in which the plaintiff resides to the Supreme Court of Mississippi, in the same manner, but not inconsistent with the provisions of this chapter, as is provided in civil cases. It shall not be necessary, in any judicial proceeding under this section, to enter exceptions to the rulings of the Board of Review, and no bond shall be required for entering such appeal. Upon the final determination of such judicial proceeding, the Board of Review

shall enter an order in accordance with such determination. A petition for judicial review shall not act as a supersedeas or stay unless the Board of Review shall so order.

SOURCES: Codes, 1942, § 7388; Laws, 1940, ch. 295; Laws, 1958, ch. 533, § 4i; Laws, 1964, ch. 442, § li; Laws, 1996, ch. 464, § 4; Laws, 2004, ch. 572, § 45; reenacted without change, Laws, 2008, 1st Ex Sess, ch. 30, § 45, eff from and after July 1, 2008.

Editor's Note — Laws, 2004, ch. 572, § 60, as amended by Laws, 2008, 1st Ex Sess, ch. 30, § 58, provides:

"SECTION 60. This act shall stand repealed July 1, 2010."

Amendment Notes — The 2004 amendment substituted "department" for "commission" throughout and made a minor stylistic change.

The 2008 amendment reenacted the section without change.

JUDICIAL DECISIONS

1. In general.
2. Collateral estoppel.
3. Review of findings of fact.
4. Review of the denial of benefits.
5. Time limitations.

1. In general.

In an appeal from a decision of the Mississippi Employment Security Commission (MESC), and the circuit court's affirmance thereon, the facts were: (1) the employee was warned in regard to an excessive number of sick days, early leaves and absences; (2) he received an unsatisfactory performance review because he had not been cooperative with campus security; (3) he was disruptive at a campus physical plant and he left work without permission; (3) he was placed on probation regarding his job performance; and finally, (4) he was arrested for robbery and possession of a firearm by a convicted felon. In its infinite wisdom, the appellate court concluded the employee was terminated, not because of the aforementioned performance issues (unrelated to his incarceration), but because of the events which surrounded his two day incarceration; in that respect, the poor fellow did not want his employer to know about his arrest, so he had his girlfriend call his employer and state that he would be absent for two days, and without the employee's permission, the girlfriend told the employer that same was due his mother's illness; his girlfriend lied, but he did not, the appellate court concluded his employer did not need to know the reason for said two day absence, and the denial of his application for unemployment benefits was reversed. Broome v. Miss. Empl. Sec. Comm'n, 921 So. 2d 360 (Miss. Ct. App. 2005).

Benefits claimant was properly denied unemployment compensation because substantial evidence showed that he voluntarily left his job under Miss. Code Ann. § 71-5-513(A)(1)(a) when he turned in his keys following a dispute over pay and a request for time off; moreover, he failed to show good cause for leaving due to this dispute because the job was not detrimental to his health, safety, morals, or physical fitness. Waldrup v. Miss. Empl. Sec. Comm'n, 951 So. 2d 597 (Miss. Ct. App. 2007).

Appellate court affirmed the trial court's ruling that the employee was terminated for misconduct and not entitled to unemployment benefits as the employee never disputed his three disciplinary write-ups when they occurred, and the employer's policy allowed it to pay the employee for the full 40-hour work week if he was less than five minutes late. Thus, the evidence supported the finding that the employee's actions constituted misconduct for having three write-ups in one year. Daniels v. Miss. Empl. Sec. Comm'n, 914 So. 2d 268 (Miss. Ct. App. 2005).

There was substantial evidence to indicate that the employee violated the em-

ployer's policy prohibiting poss
Zip drive on company premise
substantial evidence was pres
the employee had knowledge
action constituted a violation
policy; therefore, the Mississip
ment Security Commission Bo
view's decision to deny une
benefits was not arbitrary or
and was supported by subst
dence. Howell v. Miss. E
Comm'n, 906 So. 2d 766 (Mis
2004).

Pursuant to Miss. R. App.
4(a), the appellate court will n
an appeal that is not timely
former employee filed her noti
regarding the denial of une
benefits roughly 42 days after
the final judgment by the ci
and her appeal was subject t
for that reason alone. Westbro
Empl. Sec. Comm'n, 910 So.
(Miss. Ct. App. 2005).

Employer filed for appeal fro
sion of the Board of Review of
sippi Employment Security C
more than two weeks after th
deadline and apparently, ba
circuit court's decision to den
mission's motion to dismiss, de
the requisite "good cause" for th
filing. However, the appellate
left to assume that fact since
scripts were not to be found, a
review of the record revealed a
of any evidence that might
ported a finding of good caus
employer's failure to provide
dence, when viewed under the
and the appellate court's stan
view, required reversal of
court's decision ordering a new
behalf of the employer. Miss.
Comm'n v. Gilbert Home Hea
909 So. 2d 1142 (Miss. Ct. App.

Circuit court failed to use
standard of review as provide
Code Ann. § 71-5-531 becaus
that the Mississippi Employme
Commission's decision conflict
decisions of the claims exami
appeal's referee did not, in a
make the Commission's dec
trary, capricious and not su