

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CC-01203

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND
TINA L. DARBY

APPELLANTS

VS.

TRENT L. HOWELL, PLLC

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. Trent Howell, PLLC, Appellee
4. Trent Howell, Esq., Attorney for Appellee
5. Tina Darby, Claimant/Appellant
6. Honorable Andrew C. Baker, Circuit Court Judge – Yalobusha County, Mississippi

This the 25th day of November, 2009.

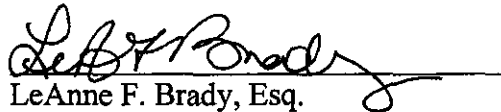

LeAnne F. Brady, Esq.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS	ii
TABLE OF CASES AND OTHER AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	4
CONCLUSION.....	12
CERTIFICATE OF SERVICE	13

TABLE OF CASES AND OTHER AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Allen v. Miss. Emp. Sec. Comm'n</u> 639 So. 2d 904 (Miss. 1994).....	5
<u>Barnett v. Miss. Emp. Sec. Comm'n</u> 583 So. 2d 193 (Miss.1991)	4, 5
<u>Hoerner Boxes, Inc. v. Miss. Emp. Sec. Comm'n</u> 693 So. 2d 1343 (Miss. 1997)	5, 7, 9, 10, 11
<u>McLaurin v. Miss. Emp. Sec. Comm'n</u> 435 So. 2d 1170 (Miss. Ct. App. 1983).....	5
<u>Richardson v. Miss. Emp. Sec. Comm'n</u> 593 So. 2d 31 (Miss. 1992).....	4
<u>Sherman v. Miss. Emp. Sec. Comm'n</u> 989 So. 2d 398 (Miss. 2008).....	10
<u>Wheeler v. Arriola</u> 408 So. 2d 1381 (Miss. 1982).....	4
 <u>OTHER AUTHORITIES</u>	 <u>PAGE</u>
Mississippi Code Annotated § 71-5-513(A)(1)(a)	5
Mississippi Code Annotated § 71-5-513(A)(1)(c)	1, 5, 10
Mississippi Code Annotated § 71-5-531	5

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

STATEMENT OF THE ISSUE

Whether the Circuit Court erred in reversing the Board of Review's decision finding that the Claimant, Tina L. Darby, proved by substantial evidence that she had good cause to leave her employment with Trent L. Howell, PLLC, pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(c) (2008).

STATEMENT OF THE CASE

Tina L. Darby [also hereafter referred to as "Claimant"] was employed for approximately eleven (11) years as a paralegal with Trent L. Howell, PLLC, [also hereafter referred to as "Employer"] of Water Valley, Mississippi. (R. Vol. 1, p. 56). Ms. Darby voluntarily left her employment on October 1, 2007, because she was being sexually harassed by her supervisor, Trent Howell. (R. Vol. 1, p. 56).

On October 9, 2007, the Claimant filed for unemployment benefits and an investigation was conducted by MDES to determine the Claimant's eligibility for unemployment benefits. (R. Vol. 1, p. 26, 35-41). After speaking with both parties, the Claims Examiner recommended disqualification of the Claimant for benefits because the Claimant failed to show good cause for voluntarily leaving her employment. (R. Vol. 1, p. 42). The Claimant filed her Notice of Appeal of this decision on November 14, 2007. (R. Vol. 1, p. 44).

A telephonic hearing before the Administrative Law Judge [also hereafter referred to as "ALJ"] was held on January 16, 2008, at which the Claimant, the Employer, and several witnesses for both parties participated. (R. Vol. 1, p. 45-162). The ALJ found the Claimant failed to prove she had good cause for voluntarily leaving her employment and affirmed the decision of the Claims Examiner. (R. Vol. 1, p. 168-170). The Claimant filed an appeal of the ALJ's decision to the Board of Review on February 4, 2008. (R. Vol. 1, p. 171). The Board of Review reversed the decision of the ALJ finding as follows:

FINDINGS OF FACT:

The Board of Review agrees with and adopts the ALJ's Findings of Fact. However, the Board of Review hereby makes the following additional Findings of Fact, to-wit: The letter from Trent Howell to claimant dated August 19, 2007 indicated that Mr. Howell would like to have a personal relationship with claimant outside of the work place, as well as a sexual relationship with her. As a result of this letter, the meeting was held between claimant, Mr. Howell, and Mr. Howell's wife, who also worked in the office. Based upon Mr. Howell's assurance that any interference with claimant's personal life or inappropriate behavior on his part would stop, claimant decided to continue working. Although Mr. Howell complied for awhile, when claimant became engaged to be married, Mr. Howell again began interfering with claimant's personal life by telling her that she should not marry her fiancé, by questioning claimant about how she spent her personal time, and by attempting to keep up or find out about her personal life outside of work. Claimant and a witness, her fiancé, also testified that on one occasion Mr. Howell came to claimant's home to pick up files, and while there made offensive statements about her decision to marry, and about her fiancé personally, to her and her fiancé.

OPINION:

The Board of Review is of the opinion that subsequent to August 19, 2007, the record evidence supports a finding that while Mr. Howell did not pursue a sexual relationship with claimant, he did begin to meddle in and interfere with claimant's personal business or affairs, and relationships. The Board of Review's opinion is supported by claimant's testimony and Mr. Howell's conduct on September 28, 2007, in which he contacted a third party to inquire about claimant's whereabouts during her absence from work. The Board of Review is further of the opinion that based on Mr. Howell's past conduct, and Mr. Howell's conduct after August 19, 2007, 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. Thus, the Board of Review is of the opinion that claimant had good cause for quitting her employment with the employer; and the decision of the ALJ should be reversed.

(R. Vol. 1, p. 186-187).

The Employer appealed the decision of the Board to the Circuit Court of Yalobusha County. (R. Vol. 1, p. 18). After review of the record and briefs submitted by both parties in this matter, the Honorable Andrew C. Baker entered his decision reversing the Board of Review on March 23, 2009. (R. Vol. 3, p. 287). The circuit court found that the Claimant and the Employer had a good working relationship until October 1, 2007. (R. Vol. 3, p. 284). After this point, the circuit court found that an “office flirtation” developed between Mr. Howell and the Claimant, Ms. Darby. (R. Vol. 3, p. 284). This led to Mr. Howell’s letter to Ms. Darby in which he expressed “how he felt about her and he would like for the relationship to continue and to become more involved.” (R. Vol. 3, p. 284). The circuit court found that this letter offended Ms. Darby and this led to a meeting between Ms. Darby, Mr. Howell and his wife, Mrs. Howell. (R. Vol. 3, p. 285). At this meeting, Mr. Howell apologized to Ms. Darby and she agreed to continue working for the firm. (R. Vol. 3, p. 285).

The circuit court held that after this meeting, the record did not show that Mr. Howell “pursued any further sexual relationship with Mr. Darby. . . .” (R. Vol. 3, p. 285). Unlike the Board’s decision, the circuit court found that Mr. Howell’s behavior toward Ms. Darby after the meeting did not “create an offensive work environment.” (R. Vol. 3, p. 286). The circuit court held that the Board’s decision was not supported by substantial evidence and reversed and reinstated the decision of the ALJ. (R. Vol. 3, p. 287).

MDES then perfected its appeal to this Honorable Court. (R. Vol. 3, p. 288).

SUMMARY OF THE ARGUMENT

The only issue in this case is whether or not the Board of Review’s decision finding the Claimant, Tina L. Darby, had good cause to voluntarily leave her employment is supported by

substantial evidence. The Claimant testified to numerous incidents of harassment and inappropriate behavior by her Employer, Trent Howell. Furthermore, Mr. Howell wrote and sent a letter to Ms. Darby which clearly indicated he would like to have a sexual relationship with her. Mr. Howell admitted to many of these incidents and to writing the letter. Additionally, MDES asserts that Ms. Darby did not have to prove Mr. Howell sexually harassed her; she only had to show by substantial evidence that her actions were reasonable under the circumstances. •

Ms. Darby worked in a small law firm for an attorney and his wife. She had few options available to her to remedy the situation. She chose to stay Mr. Howell's employ after he assured her that his inappropriate behavior would cease. However, he continued to interfere in her personal life by demeaning her fiancé, checking up on her whereabouts and discouraging her to marry. Ms. Darby had no other alternative than to leave her employment. Her actions were that of an ordinary prudent employee under the circumstances.

Thus, it is the contention of MDES that the testimony and evidence presented in this case before the ALJ was sufficient and substantial and proved that the Employer's actions constituted harassment and that Ms. Darby proved by substantial evidence that she had good cause to leave her employment. Therefore, this Honorable Court should affirm the decision of the Board of Review.

ARGUMENT

I. *Standard of Review*

The provisions of Mississippi Code Annotated Section 71-5-531 govern this appeal. That Section states that the appeals court shall consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied. Richardson v. Miss. Emp. Sec. Comm'n, 593 So. 2d 31, 34 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n, 583 So. 2d 193, 195 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381, 1384 (Miss. 1982).

In Barnett, the Mississippi Supreme Court held that:

{J}udicial review, under Miss Code Ann. Section 71-5-531 (1972), is in most circumstances, limited to questions of law, to-wit:

In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said shall be confined to questions of law.

Barnett, 583 So. 2d at 195. Furthermore, a rebuttable presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Miss. Emp. Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994). The appeals court also must not reweigh the facts nor insert its judgment for that of the agency. McLaurin v. Miss. Emp. Sec. Comm'n, 435 So. 2d 1170, 1172 (Miss. 1983).

II. *The lower court erred when it reversed the decision of the Board of Review finding that the Claimant, Tina L. Darby, proved by substantial evidence that she had good cause to leave her employment with Trent L. Howell, PLLC, due to harassment pursuant to Mississippi Code Annotated Section 71-5-513A (1)(c)(2008).*

Mississippi Code Annotated Section 71-5-513 (A)(1)(a)(2008) provides for disqualifying persons from benefits otherwise eligible for such acts as leaving work voluntarily without good cause. It will be the employee's, and not the employer's, duty to prove that the reason for the separation from employment amounted to good cause. Miss Code Ann. § 71-5-513 (A)(1)(c) (2008). Thus, what circumstances constitute good cause must be decided on a case by case basis.

The Mississippi Supreme Court has previously opined that sexual harassment in the workplace constitutes good cause for voluntarily leaving employment under Mississippi Code Annotated Section 71-5-513 (A)(3)(a). In Hoerner Boxes, Inc. v. Miss. Emp. Sec. Comm'n, 693 So. 2d 1343 (Miss. 1997), the Court held that: "we conclude that if an employee is sexually harassed to such a degree that an ordinary prudent employee would leave the ranks of the employed for the unemployed, then the employee should not be denied unemployment compensation benefits." Hoerner Boxes, 693 So. 2d at 1348. ✓

In the case *sub judice*, the Claimant worked for Trent L. Howell, PLLC, in Water Valley, Mississippi. This was a small law office consisting of the attorney, Mr. Howell; and two employees, the Claimant, Ms. Darby, and Mr. Howell's wife, Shelly Howell. (R. Vol. 1, p. 57, 61). Ms. Darby testified that the problems with Mr. Howell began after she was divorced around May of 2007, and then escalated until her separation. (R. Vol. 1, p. 57). Ms. Darby testified about a phone call she received from Mr. Howell, asking her to come and meet him for Margarita night because he "was going to be alone." (R. Vol. 1, p. 59). Ms. Darby testified that she told Mr. Howell that "he couldn't be talking that way, and that I had no interest in a relationship like that." (R. Vol. 1, p. 60). Ms. Darby testified that after this incident, Mr. Howell tried to hug her and hold her hand. (R. Vol. 1, p. 60). Ms. Darby testified that she told Mr. Howell that if he did not stop his behavior, she would have to find another job. (R. Vol. 1, p. 60).

Ms. Darby testified that Mr. Howell invited her to his home for a family cookout on July 4, 2007, and was overly interested in what she was doing later that day. (R. Vol. 1, p. 70). He called her at home on July 5, 2007, and wanted her to come to a cookout at another individual's home. (R. Vol. 1, p. 70). Ms. Darby stated that Mr. Howell called her at home almost every weekend for the last six months she was in his employ "just to find out, I guess, what I was doing." (R. Vol. 1, p. 71).

In August, 2007, Mr. Howell wrote and mailed a letter to Ms. Darby at her home. (R. Vol. 1, p. 45). This letter was entered into evidence as Claimant's Exhibit #1. (R. Vol. 1, p. 45, & R. Vol. 2, 164-167). In this letter, Mr. Howell indicated that he would like to have a personal, as well as sexual relationship with Ms. Darby, outside of the workplace. (R. Vol. 2, p. 164-167). As a result of this letter, the Claimant tried to resign from her position. A meeting was held between the Claimant, Mr. Howell and his wife on August 6. (R. Vol. 1, p. 63). At this meeting, Mr. Howell assured the Claimant that any interference with her personal life, or inappropriate behavior on his part, would

stop. (R. Vol. 2, p. 63). Ms. Darby made the decision to continue working for Mr. Howell based on these assurances. (R. Vol. 1, p. 63).

It appears from the record that Mr. Howell conformed his behavior for awhile; however, when Ms. Darby became engaged, Mr. Howell again began interfering in her personal life. Ms. Darby testified that Mr. Howell tried to talk her out of getting married and moving to Texas on an almost daily basis. (R. Vol. 2, p. 130.) Ms. Darby testified that Mr. Howell questioned how she spent her personal time, and even tried to check up on her whereabouts outside the office by calling her hair dresser, dentist, and even coming to her home. (R. Vol. 1, p. 67, 71, 106, 107, 109, 112, & Vol. 2, p. 121). Ms. Darby testified that on her last day of work, she had discovered that Mr. Howell had contacted her hairdresser looking for her. (R. Vol. 1, p. 67). Ms. Darby testified that she asked Mr. Howell about it and tried to discuss it with his wife. (R. Vol. 1, p. 67). When it appeared that Mr. Howell did not feel this behavior was inappropriate, Ms. Darby made the decision to quit.

The lower court found that the decision of the Board of Review was not supported by substantial evidence and that Mr. Howell's conduct did not create an offensive work environment. However, review of the testimony and evidence in the record shows this is not the case. The lower court found that an "office flirtation" developed between Mr. Howell and Ms. Darby. However, the only testimony that supports this conclusion is Mr. Howell's. Ms. Darby repeatedly denied flirting with Mr. Howell. (R. Vol. 2, p. 79). She testified that she made it clear she had no interest in a relationship with Mr. Howell and told him if he did not stop making advances toward her she would have to find another job. (R. Vol. 2, p. 79).

The lower court also found that during the meeting on August 6, 2007, in which all the parties met to discuss the letter Mr. Howell sent to Ms. Darby: "Ms. Darby stated that it was not all Mr. Howell's fault, that she too was to blame." Again the only testimony that supports this finding

is Mr. Howell's. In the record, the following exchange occurred when Mr. Howell was cross-examining Ms. Darby:

MR. HOWELL: We had the meeting, did we not, Ms. Darby?

MS. DARBY: Yes.

MR. HOWELL: And in that meeting did I apologize to you and Shelley?
Question.

MS. DARBY: Yes. You did.

MR. HOWELL: And did you not tell Shelley and I that you were partly
to blame?

MS. DARBY: No.

Shelly Howell, Mr. Howell's wife and employee, also testified about this meeting and did not recall Ms. Darby stating she was partially to blame. Ms. Howell testified that Mr. Howell apologized to her during the meeting and assured her that nothing else would happen. (R. Vol. 2, p. 149). She did not recall Ms. Darby admitting that she was also at fault, but that Ms. Darby stated that she was "... a flirtatious person, and that he apparently had taken it the wrong way, and she didn't appreciate it." (R. Vol. 2, p. 158).

The lower court also found that it could not find that the conduct of Mr. Howell created a hostile work environment, and that Ms. Darby, Mr. Howell and Mrs. Howell were able to meet and discuss their differences and continue a working relationship. Again, the record does not support this conclusion. Mr. Howell admitted that he came to her home in September, 2007, because Ms. Darby had some of his client files. (R. Vol. 1, p. 106). While perfectly within his right to retrieve the files, he admitted that he argued with her about her personal life. (R. Vol. 1, p. 106). Mr. Howell testified:

I made some comments, I don't know if I said the exact words, but I made comments like, she was better than this, that she didn't, you

know, she didn't . . . she was more of a responsible person, how could she behave like this, you know, was this the kind of lifestyle she wanted to continue living, you know, things like this

(R. Vol. 1. p. 108-109). He even stated during the hearing that he did not think Ms. Darby's fiancé was, "the right guy for her, still don't, but that's her business." (R. Vol. 1., p. 109). He also admitted that he called her hairdresser looking for her (R. Vol. 1, p.112), and that he called her dentist at home, and then later asked the dentist in person if Ms. Darby had an appointment. (R. Vol. 2, p. 121). Ms. Howell also testified that Mr. Howell's behavior was inappropriate and that she told Mr. Howell, "you shouldn't be doing that . . . [T]ina doesn't appreciate us making phone calls (R. Vol 2, p. 129). All of these incidents were after the August 6th meeting. (R. Vol. 2, p. 121-122).

It is clear from these admissions that Mr. Howell continued to interfere in Ms. Darby's personal life, even after the meeting on August 6. The test established in Hoerner Boxes is clear that if the harassment is of such a nature that a normal prudent person would leave their unemployment, the employee should not be denied unemployment compensation. While Mr. Howell no longer made any sexual advances toward Ms. Darby after the August 6 meeting, his behavior, taking into account his conduct prior to August 6, would lead a normal prudent person to believe that he was continuing to harass them. Ms. Darby proved by substantial evidence that she had good cause to leave her employment with Mr. Howell because she believed he would continue to harass her. This Honorable Court should affirm the decision of the Board of Review.

II. The Claimant does not have to prove that she was sexually harassed under the law, only that her actions were reasonable under the circumstances and a normal, prudent, person would have left their employment under the same situation.

MDES also asserts that when considering the issue of whether or not an employee has good cause to leave their employment, it is not necessary for the claimant to prove the employer committed bad acts, like sexual harassment, it is only necessary to prove that it was reasonable under the circumstances to leave their employment.

The Mississippi Supreme Court has previously considered the reasonableness of the Claimant's actions in determining whether or not a Claimant had good cause to leave their employment. In Hoerner Boxes, the Claimant asserted that she was sexually harassed by a co-worker. Hoerner Boxes, 693 So. 2d at 1344. The Claimant reported the harassment to her supervisor on many occasions, and the employer failed to act. Id. at 1345. The Claimant decided to leave her job when she witnessed the same co-worker sexually harass another female employee. Id. at 1344. The Claimant filed for unemployment benefits and was initially denied. Id. The Claimant appealed and the Appeals Referee reversed and awarded the claimant benefits, which was affirmed by the Board of Review. Id. The Mississippi Supreme Court affirmed, noting that the Claimant had taken steps to correct the problem prior to quitting. Id. at 1347. The Court further found that a Claimant had good cause to leave their employment if they could show that an ordinary prudent employee in their same circumstances "would leave the ranks of the employed for the unemployed." Id. at 1348.

In the recent case of Sherman v. Mississippi Emp. Sec. Comm'n., 989 So. 2d 398 (Miss. 2008), the Mississippi Supreme Court held, "unemployment benefit claimants satisfy their 'burden of proof of good cause for leaving work [,]' Miss. Code Ann. § 71-5-513(A)(1)(c) (reenacted under 2008 Miss. H.B. 1, Section 39), when they voluntarily leave employment rather than violate a statute, which is a question of law." In Sherman, the Claimant was not required to prove that the employer violated a statute or committed illegal activity. It was enough for the claimant to believe that she would be committing a crime if she remained in her current employment, thus giving her good cause to voluntarily quit. Sherman, 989 So. 2d at 402. Thus, MDES asserts that this Court should also consider whether or not Ms. Darby's actions were reasonable as an ordinary, prudent employee, at the time she left her employment.


Like the claimant in Horner Boxes, Ms. Darby attempted to resolve this problem with her employer prior to leaving her employment. She agreed to discuss the issues between her and Mr. Howell, and when he assured her that he would conform his behavior and no longer pursue an intimate relationship with her, she agreed to remain in her position. However, given Mr. Howell's previous actions toward Ms. Darby, it was reasonable for her to believe that his interference in her personal life after the meeting was based on his desire to have a personal relationship with her. The Employer was a small operation consisting of Mr. Howell, his wife, and Ms. Darby. She had previously attempted to discuss the situation with Mr. Howell and his wife. Mr. Howell continued to behave in a manner that was inappropriate. Ms. Darby had no other avenues of redress and had no choice but to leave her employment. MDES argues that under these same circumstances, a reasonable, prudent employee would have taken the same action.

CONCLUSION

There is substantial evidence to support the findings of fact and the opinion of the Board that the Claimant had good cause to voluntarily leave her employment and is entitled to unemployment compensation under Mississippi Employment Law. Thus, this Honorable Court should reverse the decision of the circuit court and reinstate the decision of the Board of Review in this matter.

RESPECTFULLY SUBMITTED this the 25th day of November, 2009.

MISSISSIPPI DEPARTMENT OF
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CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for the Mississippi Department of Employment Security,
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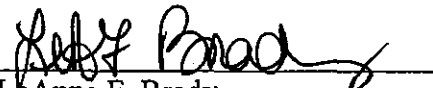
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This the 25th day of November, 2009.

Respectfully Submitted,



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