

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

**CASE NO. 2010-CC-00170**

**BERTHA COLLINS**

**APPELLANT**

**V.**

**CASE NO. 2010-CC-00170**

**MISSISSIPPI DEPARTMENT OF  
EMPLOYMENT SECURITY**

**APPELLEE**

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

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

**ORAL ARGUMENT NOT REQUESTED**

**OF COUNSEL:**

**ALBERT BOZEMAN WHITE  
ASSISTANT GENERAL COUNSEL  
MS BAR NO. [REDACTED]  
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY  
POST OFFICE BOX 1699  
JACKSON, MS 39215-1699  
Telephone: (601) 321-6073  
Facsimile: (601) 321-6076**

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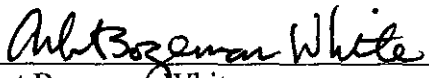
**APPELLEE**

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Department of Employment Security, Appellee
2. Albert Bozeman White, Assistant General Counsel for Appellee
3. Alexander J. Simpson, Attorney for Appellant
4. Bertha Collins, Appellant
5. Honorable James L. Roberts, Jr., Circuit Court Judge

This the 6<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Albert Bozeman White  
Assistant General Counsel (MSB #7132)  
Mississippi Department of Employment Security

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### **STATEMENT OF ISSUE**

1. Whether the Circuit Court and Board of Review decisions should be affirmed, finding that the Employer, Tony's Café, proved by substantial evidence that the Claimant, Bertha Collins, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b) (2009), by willfully and wantonly violating the Employer's reasonable standards of behavior prohibiting inappropriate behavior at the job site.

## **STATEMENT OF THE CASE**

Bertha Collins [hereinafter also "Claimant"] was employed by Tony's Café [hereinafter also "Employer"] as a waitress from late October 2008, to February 17, 2009, when she was discharged. (R. Vol 2 p. 49). Ms. Collins was terminated due to a verbal altercation with the Employer's owner, after being questioned about her no show/no call absence the previous day. (R. Vol 2 p. 50).

After termination, Ms. Collins filed for unemployment benefits. (R. Vol 2 p. 1). The Claims Examiner investigated by interviewing Teresa Davis, Owner, and Ms. Collins. (R. Vol 2 p. 9-14). Ms. Davis explained that Ms. Collins failed to report to work on Monday, February 16, 2009. (R. Vol 2 p. 12). When the Ms. Davis questioned Ms. Collins about her unexplained absence from work, Ms. Collins became agitated, irate, and used profanity at the workplace, in front of customers. (R. Vol 2 p. 12). Ms. Collins was discharged on February 17, 2009, due to this incident. (R. Vol 2 p. 12). Based upon the information obtained, the Claims Examiner disqualified Ms. Collins. (R. Vol 2 p. 15-16).

Ms. Collins appealed. (R. Vol 2 p. 22). A telephonic hearing was noticed and held. (R. Vol 2 p. 22-23, 45-86). Teresa Davis, Owner, testified for the Employer. (R. Vol 2 p. 48-53). Ms. Tawanna Collins also testified as a witness for the employer. (R. Vol 2 p. 55-62). Ms. Linda Gates testified as a witness for the Claimant. (R. Vol 2 p. 79-84). Ms. Collins also testified. (R. Vol 2 p. 63-76).

Based on the facts, the ALJ affirmed the Claims Examiner's decision. (R. Vol 2 p. 88-89). After hearing the testimony, the ALJ found that Ms. Collins was discharged for inappropriate conduct at the job site when she made inappropriate comments towards the owner, and then became upset when the owner questioned her about an unscheduled absence. (R. Vol 2 p. 89). The ALJ

further found that Ms. Collin's job was not in jeopardy when the owner first requested that she leave the premises; however, when she continued to act inappropriately, she was discharged. (R. Vol 2 p. 89).

Ms. Collins again appealed. (R. Vol 2 p. 91). After carefully reviewing the record, the Board of Review affirmed, adopting the ALJ's fact findings and conclusion. (R. Vol 2 p. 102).

The ALJ's Fact Findings and Reasoning and Conclusion were as follows, in pertinent part, to-wit:

Findings of Fact:

Based upon the record and testimony, the Administrative Law Judge finds as follows:

The claimant was employed for one year as a waitress with Tony's Café, Aberdeen, Mississippi, ending February 13, 2009. She was discharged for inappropriate conduct at the job site.

The owner of the business questioned the claimant about her absence on February 16, 2009 after she reported to work the following day. The owner maintains the claimant pointed her finger in her face and started making ugly comments to her. The owner was aware the claimant was upset and instructed her to go home. The claimant was not under the threat of termination at this point. The owner maintains the claimant followed her after she left the area and continued raising her voice and hollering. The owner also maintains the claimant shoved her. The claimant was discharged at this point. The claimant admits to arguing with the owner after she was questioned about her absence on the previous day. However, she denies pointing her finger and shoving the owner. The claimant maintains she left the job site following the employer's first request to leave. Two witnesses that were at the job site on the day of the incident also participated in the hearing. One witness confirms the claimant's testimony denying pointing her finger at the owner. The other witness maintains the claimant continued to argue after she was instructed to leave the premises. (Emphasis added).

Reasoning and Conclusion:

Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct



connected with the work, if so found by the Department,...

In the Mississippi Supreme Court, in the case of Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982), the Court held that:

"The meaning of the term 'misconduct', as used in the Unemployment Compensation Statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees.... "

The claimant was discharged for her inappropriate conduct at the job site. The claimant made inappropriate comments towards the owner when she became upset when the owner questioned her about an unscheduled absence. The claimant's job was not in jeopardy at the time of the owner's first request for her to leave the premises; however, after the claimant continued inappropriate behavior towards the owner, she was discharged. Her willful and wanton disregard of the standard of behavior an employer has a right to expect constitutes misconduct as the term is defined under the Law. (Emphasis added).

The decision rendered by the Department will be modified by the effective date of disqualification only.

(R. Vol 2 p. 88-89).

Ms. Collins then appealed to the Circuit Court. (R. Vol. 1, p. 6-12). MDES filed an Answer and the Record Transcript on September 11, 2009. (R. Vol. 1, p. 19-20). Subsequently, Briefs were filed by the Claimant and MDES. (R. Vol. 1, p. 21-47). The Circuit Court affirmed MDES's decision on January 11, 2010. (R. Vol. 1, p. 50-51).

The Claimant then appealed to this Honorable Court. (R. Vol. 1, p. 53-63).

## **SUMMARY OF THE ARGUMENT**

In the case of Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982), the Supreme Court adopted the following definition of misconduct in unemployment benefit cases, to-wit:

The meaning of the term “misconduct”, as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees... (emphasis added).

The case authorities consistently hold that one willful and wanton, or grossly negligent, violation of reasonable Employer policy or standards of behavior may constitute disqualifying misconduct. Mississippi Employment Security Commission vs. Percy, 641 So.2d 1172 (Miss. 1994); Henry v. Mississippi Department of Employment Security, 962 So. 2d 94 (Miss. Ct. App. 2007); Ray v. Bivens, 562 So. 2d 119 (Miss. 1990).

In the instant case, Ms. Collins was discharged for willful and wanton misconduct for violating Employer's policy prohibiting inappropriate behavior at the job site, justifying immediate discharge. The Employer's owner's testimony, Teresa Davis, established when she confronted Ms. Collins about failing to report to work the day before, Ms. Collins became agitated, irate, and used profanity. Further, although Ms. Collins' testimony indicated that there may have been some confusion over whether or not she was scheduled to work on the previous day, she admitted to getting involved in a verbal altercation with Ms. Davis, her employer. When Ms. Collins was instructed to leave the premises, she continued to argue with Ms. Davis, and did so in front of customers. Ms. Davis then testified that when Ms. Collins raised her voice and shoved her, she was discharged.

Since the testimony substantially supports the Board of Review and Circuit Court Decisions

that Ms. Collins committed disqualifying misconduct by willfully and wantonly violating the Employer's policy prohibiting inappropriate behavior at the job site, this Honorable Court should affirm, based upon the standard of review on appeal. Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (1992); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

## ARGUMENT

Ms. Collins' appeal is governed by Mississippi Code Annotated Section 71-5-531 (Rev.2009), which provides for appeals by any party aggrieved by the decision of the Board of Review or Circuit Court. Mississippi Code Annotated Section 71-5-531 states that the **appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied.** (Emphasis added). Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (1992); Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

Further, a rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Security Commission, 639 So.2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Further, misconduct imports conduct that reasonable and fair minded external observers would consider wanton disregard of the employer's legitimate interests. Mississippi Employment Security Commission v. Phillips, 562 So.2d 115, 118 (Miss. 1990).

In the instant case, Teresa Davis, Owner, testified on behalf of the Employer. (R. Vol 2 p. 48-53). Mr. Davis testified that Ms. Collins worked for the company from the end of October, 2008, to February 17, 2009. (R. Vol 2 p. 49). She was a waitress at the time she was discharged. (R. Vol 2 p. 49). Ms. Collins worked Monday thru Friday, from 10:00 a.m. until 2:00 p.m. (R. Vol 2 p. 49).

Ms. Davis was questioned as to why Ms. Collins was discharged. Ms. Davis stated that Ms. Collins was discharged because of a verbal and physical altercation that took place on February 17,

2009. When Ms. Davis questioned Ms. Collins about missing work on the previous day, Ms. Collins became agitated, irate, and pointed a finger in her face. (R. Vol 2 p. 50-51). She explained that she asked Ms. Collins to go home, and then proceeded to go to the front of the restaurant. Ms. Collins followed her out to the front of the restaurant, continuing to argue with Ms. Davis, raising her voice, and shoved her. (R. Vol 2 p. 51-52).

Ms. Davis was asked whether there were any witnesses to any of the incidents described. She explained that everyone in the kitchen saw Ms. Collins put her finger in her face, and heard everything that was said. (R. Vol 2 p. 52). She further testified that Ms. Collins would not have been discharged if it were not for the behavior described. (R. Vol 2 p. 53).

Ms. Tawanna Collins testified next. (R. Vol 2 p. 55-62). Ms. T. Collins stated that she was a buffet cook at Tony's Café, and Ms. Collins' sister. (R. Vol 2 p. 55). Ms. T. Collins testified that she was present when the altercation between Ms. Davis and Ms. Collins took place, and that after a brief discussion about Ms. Collins missing work the previous day, both parties began shouting at one another. (R. Vol 2 p. 56). On cross-examination by Employer Representative, Ms. T. Collins stated that Ms. Davis told Ms. Collins to leave the restaurant, and that Ms. Collins did follow Ms. Davis to the front of the restaurant and continued the verbal altercation (R. Vol 2 p. 57-58). On cross-examination by the Claimant, Ms. T. Collins testified that she heard both parties using profanity. (R. Vol 2 p. 59-60).

Ms. Collins testified next. (R. Vol 2 p. 63-76). She stated that she had a set work schedule from 10:00 a.m. to 2:00 p.m., Monday thru Friday. (R. Vol 2 p. 63-64).

Ms. Collins was then questioned about the incident on February 16, 2009. She admitted to arguing with Ms. Davis in the kitchen, but denied pointing her finger in Ms. Davis' face. (R. Vol 2

p. 68). Ms. Collins also admitted that the altercation continued in the front of the restaurant, and admitted to using profanity. (R. Vol 2 p. 68-69). She denied shoving, or otherwise touching, Ms. Davis. (R. Vol 2 p. 69).

Ms. Collins was then cross-examined by Mr. Stanfield, her attorney. (R. Vol 2 p. 71).

Ms. Collins was then re-directed by the ALJ. Ms. Collins was questioned as to whether she personally spoke to Ms. Davis about working on Monday. Ms. Collins admitted that Ms. Davis spoke only to Ms. T. Collins. (R. Vol 2 p. 75).

Ms. Linda Gates was the last to testify. (R. Vol 2 p. 78-84). She stated that she was a friend of Ms. Collins, and was at work and witnessed the infraction on February 17, 2009. (R. Vol 2 p. 79). She stated that after Ms. Davis questioned Ms. Collins about missing work the previous day, the two began arguing in the kitchen. (R. Vol 2 p. 80). She observed Ms. Davis and Ms. Collins arguing in the front of the restaurant, and observed Ms. T. Collins having to get between the two at one point. (R. Vol 2 p. 81). Ms. Gates did not witness any physical altercation. (R. Vol 2 p. 81).

The instant case is akin to the misconduct line of cases involving a grossly negligent, or willful and wanton, and substantial or serious disregard of an employee's job duties, and the employer's interest. In these cases, the behavior causing termination is within the capacity and control of the employee, is a serious disregard of work-related duties, and constitutes misconduct. See Henry v. Mississippi Dept. of Employment Sec., 962 So. 2d 94 (Miss. Ct. App. 2007) (security guard's disregard of duties justified termination for misconduct); Mississippi Employment Sec. Comm'n. v. Percy, 641 So.2d 1172 (Miss. 1994) (a nurse was terminated for violating the employer's policy requiring that she appropriately complete time sheets); Sojourner v. Mississippi Employment Sec. Comm'n., 744 So. 2d 796 (Miss. Ct. App. 1999) (security guard's failure to follow policy

prohibiting remaining on property after shift hours constituted misconduct); Young v. Mississippi Employment Sec. Comm'n, 754 So. 2d 464 (Miss.1999) (employee's refusal to turn in her employee identification badge during a suspension constituted insubordination); Halbert v. City of Columbus, 722 So. 2d 522 (Miss. 1998) (an employee's refusal to submit to a random drug test constituted insubordination).

Analogously, in Swinney v. Mississippi Employment Sec. Comm'n, 910 So.2d 742 (Miss. Ct. App. 2005), the Claimant was discharged for inappropriate behavior on the job. In this case, Swinney was involved in an argument with a manager, at which time she became verbally abusive to him. She was terminated the same day. The Board of Review disqualified Swinney from receiving benefits, finding that she was fired for disrespecting authority and insubordination, both of which constituted misconduct. Swinney appealed to the Circuit Court of Leflore County, and Mississippi Court of Appeals, both of which affirmed. Id.

In Mississippi Employment Sec. Comm'n and Yazoo Industries v. Hudson, 757 So.2d 1010 (Miss. Ct. App. 2000), the Mississippi Court of Appeals held that uttering of vulgar obscenities by the claimant directed at her supervisor constituted insubordination and misconduct, and thus the claimant was not entitled to unemployment compensation. Hudson was terminated for insubordination when she verbally confronted her team leader and supervisor after she was given a new job assignment. The obscenities continued until the floor supervisor intervened, and employees of Yazoo Industries ceased their production to witness the disturbance. During the claims examiner's investigation, Hudson admitted that she had used profanity during the confrontation, but asserted that she was provoked into cursing by her team leader.

The Board of Review ruled that Hudson's conduct amounted to insubordination which

constituted disqualifying misconduct. The decision to deny benefits was based on Hudson's refusal to perform her assigned tasks and for her use of profanity directed towards her team leader and supervisor. Ms Hudson appealed to the Circuit Court of Yazoo County. The Circuit Court reversed the Board of Review's decision, concluding that while substantial evidence existed to support the referee's factual findings that Ms. Hudson was insubordinate, such an "isolated incident in which profanity was used towards a superior is not tantamount to misconduct under the law." Id. On appeal to the Mississippi Court of Appeals, the court reversed, finding that Ms. Hudson inappropriately reacted to her supervisor's repeated orders to perform authorized and reasonable tasks. The Court of Appeals ruled that Ms. Hudson's behavior constituted disqualifying misconduct, because Ms. Hudson escalated the confrontation, used vulgar obscenities, and directed them towards her supervisor. Since the encounter went so far as to briefly disrupt other employees, the Court held that "such unreasonable conduct could only be characterized as a wanton disregard of the employer's legitimate interests and is conduct which runs counter to the behavior which the employer has the right to expect from his employee." Id.

In the instant case, Ms. Davis reasonably questioned her employee, Ms. Collins, about missing work the previous day. Ms. Collins admitted that her normal work schedule included Mondays, and also admitted that Ms. Davis never personally told her not to come to work. (R. Vol 2 p. 63-64, 75). Objecting to the Employer questioning, Ms. Collins used profanity, directed at her supervisor, in the front of the restaurant, in front of patrons as well as other employees. (R. Vol 2 p. 57-58, 68-69). At one point, Ms. T. Collins, another employee, had to separate the two. (R. Vol 2 p. 81).

Ms. Collins had every opportunity to remove herself from the situation. Her employer, Ms.



Davis, asked her repeatedly to leave the premises, but Ms. Collins refused and continued arguing with Ms. Davis, even following her to the front of the restaurant. There Ms. Collins used profanity in front of customers. (R. Vol 2 p. 57-58, 69). This conduct constitutes a willful and wanton disregard of the employer's legitimate interests, is conduct which runs counter to the behavior which the employer has the right to expect from an employee, and, as such, constitutes misconduct.

## RESPONSE TO DUE PROCESS ARGUMENT

The Claimant's counsel argues that the Court should reverse because the Claimant was not sufficiently apprized of the issues to be considered at the ALJ's hearing, citing Booth v. Mississippi Employment Security Commission, 588 So.2d 422, 427-28 (Miss. 1991). However, Booth, supra, provides that minimum due process is applicable to unemployment insurance cases and appeals; and due process is satisfied if notice is reasonably calculated to apprise the interested parties of the hearing. Id.

In that regard, Ms. Collins was informed in a letter entitled "Administrative Law Judge acknowledgment of Appeal Filed" that the hearing would be a "de novo" hearing. (R. Vol 2 p. 23). Further, in the Notice of Telephone Hearing, Ms. Collins was informed that the issue to be considered was: "(1) whether the Claimant is entitled to unemployment insurance benefits based on the reason for separation from employment...". (R. Vol 2 p. 25-26). Further, attachments included instructions to the Claimant. (R. Vol 2 p. 29-31). Finally, the Claimant was represented by counsel at the hearing. Her attorney, Mr. Stanfield, was twice given an opportunity to voice any objections to the procedure at the hearing; and he did not. (R. Vol 2 p. 48, 86).

Thus, it is apparent that the Claimant was afforded, at least, minimum due process in this matter; and the Claimant's counsel's appeal or objections based upon due process grounds should be denied.

### CONCLUSION

The testimony establishes that Ms. Collins did not think it necessary to report to work on Monday, February 16, 2009, although her schedule required it. Never, at any point, did Ms. Davis tell Ms. Collins not to come to work. The testimony also established that upon questioning about her unexplained absence, Ms. Collins became agitated, irate, repeatedly objected, and used profanity in the workplace, in front of customers. Based upon the record, there is substantial evidence supporting MDES's decision that Ms. Collins knew or should have known her actions violated the Employer's policy. Thus, this Honorable Court, as an appellate court, should accept the Circuit Court's and Board's Decision; and affirm.

RESPECTFULLY SUBMITTED, this the 6<sup>th</sup> day of July, 2010.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT  
SECURITY

BY: Albert Bozeman White  
ALBERT BOZEMAN WHITE


OF COUNSEL:

Albert Bozeman White, Assistant General Counsel  
MSB No. [REDACTED]  
Post Office Box 1699  
Jackson, MS 39215-1699  
Tel. (601) 321-6074

**CERTIFICATE OF SERVICE**

I, Albert Bozeman White, Attorney for Appellee, Mississippi Department of Employment Security, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to Alexander J. Simpson, Attorney for Appellant, Bertha Collins, at North Mississippi Rural Legal Services, Post Office Box 139, Tupelo, MS 38802; Tony's Café, Employer, at 113 West Commerce Street, Aberdeen, MS 39730; and the Honorable James L. Roberts, Jr., Circuit Court Judge, at Post Office Drawer 1100, Tupelo, MS 38802-1100.

THIS, the 6<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
ALBERT BOZEMAN WHITE