

**IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-CC-00170**

BERTHA COLLINS

APPELLANT

V.

CASE NO. 2010-CC-00170

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

REPLY BRIEF OF APPELLANT, BERTHA COLLINS

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

ORAL ARGUMENT REQUESTED

**APPELLANT'S COUNSEL:
ALEXANDER J. SIMPSON, III
NORTH MS RURAL LEGAL SERVICES
MS BAR NO. 10202
P.O. BOX 139
TUPELO, MS 38802
Telephone: (662) 842-3702
Facsimile: (662) 840-8060**

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SUMMARY OF REBUTTAL

This is not a case of willful and wanton misconduct. Appellant Bertha Collins was terminated from her employment after a single incident where she objected to being wrongfully accused of being absent without notice to her employer. Under Mississippi law, a single, isolated incident does not constitute misconduct within the meaning of the unemployment statute. The record is clear that there was no physical altercation involved, and that the supervisor was the one that not only provoked the verbal altercation, but also continued it after Collins attempted to leave the premises as instructed. Mississippi is an employment-at-will State, and the employer may terminate an employee with or without cause, but unemployment benefits cannot be denied without substantial evidence of misconduct as defined by Mississippi law. That evidence simply is not present in this case. This Court should reverse the Circuit Court of Monroe County, declare the notice provided to Collins inadequate as a matter of law, and award Collins unemployment benefits retroactive to February 17, 2009.

This is a case of a violation of Collins' rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article 3, §14 of the Mississippi Constitution. It is well settled law that Collins was entitled to actual notice of the **precise issues** to be determined at her administrative hearing. She was not provided with such notice. The Notice of Non-Monetary Decision that was provided to her was misleading, in that it identified absenteeism without notice to the employer as her reason for discharge, when testimony from the employer at the administrative hearing is clear and unambiguous that Collins was not fired for being absent without notice. The Notice of Telephone Hearing was overly

broad, in that it informed Collins that the subject of the hearing would be whether she was eligible for unemployment benefits based on the reason for separation. This alleged “notice” is worthless, because it tells Collins only that her hearing can consider any reason she may be denied benefits. It does not notify her of the **precise issues** to be determined at her administrative hearing, as it must to comply with the requirements of Due Process. This Court should reverse the Circuit Court of Monroe County, declare the notice provided to Collins inadequate as a matter of law, and award Collins her unemployment benefits retroactive to February 17, 2009.

Argument

This is not a case of willful and wanton misconduct.

MDES relies on a series of cases dealing with willful and wanton, or grossly negligent, misconduct as support for their position that Collins should be denied unemployment benefits for willful and wanton misconduct. Such reliance is misplaced, as the cases cited are easily distinguishable from the case at bar.

In *Henry v Mississippi Department of Employment Security*, 962 So. 2d 94, (Miss. Ct. App. 2007), the claimant, Henry, a food service worker at a correctional facility, was disqualified not for a single incident, but for a series of actions taken after warnings and/or instructions regarding applicable rules of conduct in the workplace were given. Specifically, Henry was fired for four separate incidents: failure to adequately supervise inmates, installing unauthorized computer programs, unauthorized use of inmate worker, and possession of unauthorized items. The Court held that the totality of the incidents sufficed as misconduct. The situation in *Henry*, *Id.*, is not at all analogous to the facts in the case at bar. Collins had an unblemished record of

excellent performance at her work, as was admitted by her supervisor, Ms. Davis. *Administrative Record*, Page 77. This is a “single incident” case, and this Court has held that a single incident is insufficient to disqualify a terminated employee from receiving unemployment benefits. See *Mississippi Employment Security Commission v. McClane-Southern*, 583 So. 2d 626. (1991). The Court of Appeals has followed that decision in *Acy v. Mississippi Employment Security Commission*, 960 So. 2d 592 (COA 2007) and in *Gordon v. Mississippi Employment Security Commission*, 864 So. 2d 1013 (COA 2004).

In *Mississippi Employment Security Commission v. Percy*, 641 So. 2d 1172 (Miss 1994), a nurse was disqualified for falsifying her time cards numerous times over a six week period, and for signing her supervisor’s initials on those time cards without permission. Again, this is a totality of the circumstances analysis, which does not apply to the case at bar. Percy’s actions were not a single, isolated incident; were in direct violation of her employee handbook, and involve issues of moral turpitude. The Court held that falsifying time cards constitutes misconduct as a matter of law. Collins did not falsify anything, had no written employee handbook, and was fired after a single, isolated incident, not after a pattern of multiple incidents that constitute misconduct when considered together.

In *Sojourner v. Mississippi Employment Security Commission*, 744 So. 2d 796 (COA 1999), a security guard was fired for violation of written policy that he was to leave the premises within fifteen minutes of the end of his shift, disobeying the direct verbal instruction of his supervisor that he was not to enter a particular area unless called by a nurse, and possible abuse/neglect of patients. Again, this case is easily distinguished from the case at bar, because Collins had no written policy and did not disobey direct verbal instructions from her supervisor.

She verbally defended herself from an unjust accusation of missing a shift she was not scheduled to work, and was fired largely because her supervisor lost her temper over an isolated incident.

In *Young v. Mississippi Employment Security Commission*, 754 So. 2d 464 (Miss 1999), a casino employee was fired for getting one supervisor to approve a change in her break schedule without telling that supervisor that another supervisor had already denied the change, and for refusing to turn in her employee identification badge. Again, this was not a single, isolated incident resulting in termination. This was two separate and distinct wrongful acts, which considered together, amounted to misconduct. The first act was a trick any five year old knows is not going to fly, one cannot play one authority figure against another to get one's way. The second was a violation of written policy, and the employer had a legitimate security interest in enforcing said policy. This case is distinguished from the case at bar because Collins was fired solely for the verbal argument with her supervisor. She did not attempt to circumvent established procedures, nor did she withhold any property rightfully belonging to her employer. She had a good faith belief that she was being unjustly accused of absenteeism without notice, and she defended herself against that accusation.

In *Swinney v. Mississippi Employment Security Commission*, 910 So. 2d 742 (COA 205), an employee was terminated for disrespecting authority and insubordination after using profanity towards a manager. Once again, this was not a single, isolated incident, because Swinney had previously received a written warning about similar behavior on the job. This case is easily distinguishable from the case at bar because Collins had a previously unblemished record, with no warnings either written or verbal.

In *Mississippi Employment Security Commission and Yazoo Industries v. Hudson*, 757

So. 2d 1010 (COA 205), a line operator was fired for insubordination and misconduct after using profanity towards a supervisor. Once again, this was not a single, isolated incident, as the Court recognized:

While facially Hudson's refusal to perform the task assigned may appear to be an isolated incident of insubordination, a detailed review of the facts and circumstances surrounding the incident in question reflects differently. The record reflects that after Hudson was assigned a new production station, she immediately began to express her displeasure with her new assignment. In expressing her displeasure, Hudson stated that she was not going to try to keep up her station. When confronted by her supervisor over her statements regarding the assigned task, Hudson repeatedly refused to perform the assignment despite the supervisor's attempts to show her how to run the station. The situation then escalated to the point that Hudson used extremely vulgar obscenities and directed them towards her supervisor during her refusal to perform her assigned tasks. The encounter even went so far as to briefly disrupt two of Yazoo Industries production lines. Such conduct could only be characterized as a wanton disregard of the employer's legitimate interests and as conduct which runs counter to the behavior which the employer has a right to expect from his employee.

Id. This case is easily distinguishable from the case at bar, because Collins did not refuse to perform any assigned tasks, did not cause a work stoppage, did not refuse to attempt to learn new tasks, and did not refuse to follow any instructions she was given. Contrary to Appellee's assertions, Collins made every effort to avoid escalating the situation. She was attempting to depart the premises, and it was her supervisor, Ms. Davis, who continued the confrontation by following Collins to the front of the restaurant, continuing to berate her and use profanity. Considering the totality of the circumstances, the behavior exhibited by Collins simply does not rise to the level of misconduct sufficient to deny her unemployment benefits.

To summarize, MDES here relies on a series of cases where there was more than a single, isolated incident leading to the worker's termination and subsequent disqualification from receiving unemployment benefits. Those cases are easily distinguishable from the case at bar,

because Collins was fired for a single, isolated incident, as admitted by her supervisor in sworn testimony at the administrative hearing:

Davis: I've never had no problem with her. This would be the first incident I've ever had with her. She was one of my best employees. It's all just a misunderstanding, I guess.

Administrative Record, Page 77. Applying a totality of the circumstances analysis, as the Courts did in the cases cited by MDES, inevitably leads to the conclusion that Collins was an exemplary employee that was terminated after a single, isolated incident of a minor verbal altercation with Ms. Davis. Collins had a legitimate, good faith belief that she was not required to work a particular shift, and defended herself against wrongful accusations and profanity directed at her by her supervisor. The degree of culpability necessary to establish misconduct for the purpose of disqualifying her from receiving unemployment benefits is simply not present in this record. This Court should reverse the decision of the Circuit Court of Monroe County, declare the notice provided to Collins inadequate as a matter of law, and award her unemployment benefits retroactive to February 17, 2009.

“Minimum Due Process” does not mean “No Due Process”

MDES claims that Collins was provided “minimum due process”, because she was told that her administrative hearing would be a “de novo” hearing to decide whether she was entitled to unemployment benefits based on the reason for separation from employment. Such a position is inconsistent with this Court’s holding in *Booth v. Mississippi Employment Security Commission*, 588 So. 2d 422, 427-28:

An elementary and fundamental requirement of due process in any proceeding which is to

be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. This notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.

Id. (Emphasis added).

A notice which fails to inform the claimant of the **precise nature** of the issues to be determined at the administrative hearing fails to meet that standard. It is not possible to prepare an adequate defense, especially in an administrative setting where there is no formal discovery, without knowing exactly what allegations the employer intends to raise against the employee. This amounts to trial by ambush. It isn't fair, and it isn't constitutional. The United States Supreme Court has held that a party must be notified in advance of the precise issues to be raised in an administrative hearing. *In Re Ruffalo*, 390 U.S. 544 (1968).

Collins did not receive adequate notice, therefore her right to due process of law under the Fifth and Fourteenth Amendment to the United States Constitution, Article 3, §14 of the Mississippi Constitution, 42 U.S.C.S. §503(a)(3), and MDES Regulation 200.02 (B)(1), has been violated. This Court has a duty to protect the rights of all citizens of this State, and that duty can only be met by forcing MDES to provide adequate notice of the precise issues to be determined at administrative hearings.

Conclusion

Bertha Collins is not guilty of misconduct within the meaning of the unemployment law of this State. The records shows only a single incident of a minor verbal altercation with her supervisor, and the supervisor has admitted that Collins was fired solely because of that incident.

Collins should have been awarded her unemployment benefits at the claims examiner level.

Unfortunately, that is not what happened. Her claim was denied, she appealed, was given inadequate notice of the **precise nature** of the issues to be determined at her hearing, and the administrative law judge incorrectly applied the law in denying her claim. She then appealed again, and the Circuit Court of Monroe County incorrectly applied the law in affirming the denial, which brings her to this Court.

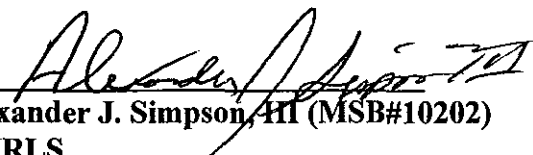
She raises two issues. The first, and most important, is the fact that her due process rights have been violated by the inadequate notice provided by MDES. This Court has the opportunity to correct the problem with minimal impact to MDES. A few simple sentences, perhaps a paragraph, tailored to identify the precise issues to be determined in an individual administrative hearing is an inconsequential burden to impose on an administrative agency charged with administering the unemployment compensation laws of this State, and would fully satisfy the due process rights of all claimants.

Her second issue, limited to only the facts of her case, is that a single, isolated incident involving an otherwise exemplary employee may be grounds to terminate her employment, but it is clearly not sufficient to deny her claim for unemployment benefits. MDES has produced no authority to support the notion that a single, isolated incident will so suffice, and the cases they have cited are all easily distinguishable from the facts in the case at bar.

This Court should reverse the decision of the Circuit Court of Monroe County, declare the notice provided to Collins inadequate as a matter of law, and award her unemployment benefits retroactive to February 17, 2009.

RESPECTFULLY SUBMITTED, this the 23 day of July, 2010.

BERTHA COLLINS,
APPELLANT

By: 
Alexander J. Simpson, III (MSB#10202)
NMRLS
P.O. Box 139
Tupelo, MS 38802
(662)842-3702

Certificate of Service

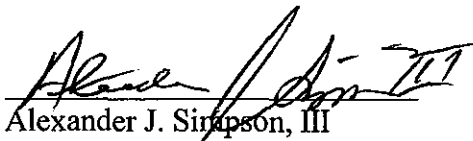
I, Alexander J. Simpson, III, Attorney for Appellant, do hereby certify that I have, this day, sent by regular U.S. Mail, postage prepaid, true and correct copies of the foregoing Reply Brief of Appellant to the following people at the addresses listed:

Hon. Albert White
MDES/Attorney for Appellee
P.O. Box 1699
Jackson, MS 39215-1699

Tony's Café, Employer
113 W. Commerce St.
Aberdeen, MS 39730

Hon. James L. Roberts, Jr.
Circuit Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

This the 23 day of July, 2010.


Alexander J. Simpson, III