

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

BERTHA COLLINS

APPELLANT

VS

**MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY**

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

Alexander J. Simpson, III, MSB# [REDACTED]
Counsel for Appellant
NMRLS
P.O. Box 139
Tueplo, MS 38802
(662)842-3702

ORAL ARGUMENT REQUESTED

Certificate of Interested Persons

No. 2010-CC-00170 - Bertha Collins v. Mississippi Department of Employment Security

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. Bertha Collins - Appellant
2. Mississippi Department of Employment Security - Appellee
3. Tony's Café, Aberdeen, MS - former employer of Appellant
4. Alexander J. Simpson, III - Counsel for Appellant
5. North Mississippi Rural Legal Services - Employer of Alexander J. Simpson, III
6. Hon. James L. Roberts, Jr.- Circuit Judge

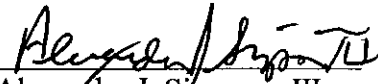

Alexander J. Simpson, III
Attorney of Record for
Bertha Collins, Appellant

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STATEMENT OF THE ISSUES

1. Whether the Mississippi Department of Employment Security violated Bertha Collins' 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), 42 U.S.C. 1983, and MDES Regulation 200.02 (B)(1)(c) by failing to provide her with proper notice of the precise issues to be determined at her administrative hearing regarding her eligibility for unemployment benefits?
2. Whether a single instance of absenteeism without notice to the employer meets the definition of "misconduct" within the meaning of unemployment law?

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

This case is one of first impression in Mississippi. Important questions of constitutional rights under the "Due Process" clauses of the Fifth and Fourteenth Amendments are raised, and

oral argument will assist the Court in fully analyzing those issues. This Court's decision will affect the operations of the Mississippi Department of Employment Security and the rights of all citizens of this state attempting to qualify for unemployment benefits.

STATEMENT OF THE CASE

Bertha Collins, Appellant (hereinafter "Collins") was employed at Tony's Café in Aberdeen, Mississippi from approximately February 1, 2007 until February 17, 2009. (Administrative Record, Page 49) During this two year period, Collins did not receive any warnings, writeups, or reprimands for any work related conduct. (Administrative Record, Page 77) Business has been somewhat slow on holidays at Tony's Café, and the manager would sometimes operate with reduced staff on those days. (Administrative Record, Page 62, 65). The weekend beginning on Friday, February 13, 2009 was a holiday weekend, preceding the President's Day holiday on Monday, February 16, 2009. There was no written schedule posted in the workplace, showing which employees were scheduled to work particular days/shifts. (Administrative Record, Page 60). Collins was instructed by her manager, Teresa Davis, that Collins would be notified by telephone if she was needed to work that Monday. No such call was made, therefore Collins did not report to work, reasonably believing that she was not required to work at that time. (Administrative Record, Page 65). On Tuesday, upon her arrival at work, Collins was accused of failing to report to work on Monday, February 16, 2009. Collins expressed her belief that she was not scheduled or otherwise required to work on that day. Ms. Davis continued to berate Collins, instructed her to leave the premises, and followed Collins from the rear of the location through the dining room, continuing the confrontation to the point that another employee intervened to prevent the situation from escalating. Collins, believing that

her employment had been summarily terminated at the point she was instructed to leave the premises, filed her claim for unemployment benefits. (Administrative Record, Page 65-70)

The Mississippi Department of Employment Security, Appellees, (hereinafter "MDES") denied Collins' claim for benefits, and advised her of said decision via a "Notice of Nonmonetary Determination Decision", ID#282414, mailed on April 6, 2009. Said decision reads, in pertinent part:

You were separated from your employment with Tony's Café on 2/13/2009. An Investigation reveals you were discharged for absenteeism without proper notification to your employer. The reason for your discharge is considered misconduct connected with your work. You failed to respond to our request for information regarding this issue. You are disqualified from receiving Unemployment Insurance benefits beginning 2/17/2009. The disqualification will continue until you have been reemployed and earned \$976.00, which is eight times your weekly benefit amount.

(Administrative Record, Page 11)(Emphasis added).

Collins timely filed an appeal, and the case was scheduled for a telephonic hearing before an Administrative Law Judge on June 19, 2009. Collins then received a "Notice of Telephone Hearing" dated June 8, 2009, which stated:

The issue to be considered is:

- 1) Whether the Claimant is entitled to unemployment insurance benefits based on the reason for separation from employment; and*
- 2) Whether the Employer's experience rating record is chargeable for benefits; Sections 71-5-513 A (1) and 71-5-355, Mississippi Employment Security Law.*

(Administrative Record. Pages 25-26).

The hearing was held, Collins appeared with her representative and witnesses, the employer appeared via the above mentioned Ms. Davis and a witness. At said hearing, Ms. Davis admitted that the alleged absenteeism without notice to the employer was not the reason for Collins' termination. (Administrative Record, Page 53). The hearing then addressed matters arising out of an alleged verbal altercation between Collins and Ms. Davis, even though Collins had no prior notice it would be considered at the hearing. The Administrative Law Judge issued a written decision dated June 25, 2009, finding that Collins was discharged for misconduct arising out of the alleged verbal confrontation and thus was ineligible to receive unemployment benefits. Said decision was timely appealed to the Board of Review, which affirmed the Administrative Law Judge by decision dated July 22, 2009. (Record @ 10). Collins then timely appealed to the Circuit Court of Monroe County, Mississippi, which affirmed the Board of Review decision by Order dated January 11, 2010. (Record @ 50-51). This appeal is taken from the Order of the Circuit Court of Monroe County, Mississippi.

Summary of the Argument

It is well settled law that unemployment benefits are a property interest, protected under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article 3, §14 of the Mississippi Constitution. Additionally, claimants are entitled to a "fair hearing" pursuant to 42 U.S.C.S. 503(a)(3). In order to have a fair hearing, with due process, claimants are entitled to actual notice of the **precise issues** to be determined at said hearing.

In this case, Collins was only given notice that her discharge was for absenteeism without notice to her employer, nevertheless, even though the employer admitted that absenteeism was

not the reason for her discharge, she was denied benefits by the administrative law judge for misconduct arising out of an alleged verbal altercation occurring after the absenteeism. Collins had no notice that the alleged verbal altercation would be discussed or considered at the administrative hearing.

The “Notice of Telephone Hearing” is actually less informative than the earlier “Notice of Non Monetary Decision”, and violates the plain meaning of MDES Regulation 200.02 (B)(1) (c), which provides:

- (1) *Contents of the Notice of Hearing:*
 - (a) *A statement of the legal authority and jurisdiction under which the proceeding is being conducted;*
 - (b) *A reference to the applicable statutes and rules;*
 - (c) *A statement of the issues to be decided;*
 - (d) *A statement of the time (and if in person the place) of the hearing;*
 - (e) *A phone number that the parties must call the day before and leave their phone contact number for the time of the hearing.*

Said notice given to Collins only advised her that the issue to be considered was whether she was eligible for unemployment benefits based on the reason for separation, but fails to identify precisely what the reason for separation was. Under a literal reading, the “Notice of Telephone Hearing” advises Collins that the hearing will address any reason she may have been terminated from her job. The law requires more than that. Even reading the “Notice of Non Monetary Decision” in conjunction with the “Notice of Telephone Hearing” and giving MDES the benefit of any doubt as to what notice was provided, they gave Collins notice of one reason for her termination, and then denied her benefits for a completely different reason. This “issue

switching” violates Collins right to Due Process by denying her a fair hearing, where she could present a defense to the precise issues to be considered. She cannot be expected to adequately prepare a defense against issues she has no notice will be considered. State and Federal case law is clear. Collins is entitled to have notice of the **precise issues** to be decided at her administrative hearing, and the failure to provide such notice violates Collins’ Constitutional and Statutory rights. (Citations provided in the Argument section of this brief).

The only meaningful notice provided to Collins was that she was discharged for absenteeism without notice to the employer, and even that notice was not contained in the “Notice of Telephone Hearing” as is required by MDES regulations.

Even if the hearing had only addressed the issue of absenteeism without notice to the employer, MDES could not have disqualified her from receiving benefits, because a single, isolated incident of absenteeism, particularly one where there was clearly a misunderstanding about whether Collins was required to work a particular day, does not meet the definition of “misconduct” under the unemployment law of this State.

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 Collins her unemployment benefits retroactive to February 17, 2009.

Argument

Whether the Mississippi Department of Employment Security violated Bertha Collins’ 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)(c) by failing to provide her with proper notice of the precise issues to be determined at her administrative hearing regarding her eligibility for unemployment benefits?

The receipt of unemployment insurance benefits is a property right entitled to Due Process protection. *Ross v. Horn*, 598 F. 2d 1312, 1317-1318 (3rd Cir. 1979), cert denied 448 U.S. 906 (1980). See also *Fusari v. Steinberg*, 419 U.S. 379, rehearing denied 420 U.S. 955 (1980). The Social Security Act, as codified at 42 U.S.C.S. 503 (a)(3) provides similar protection by requiring a “fair hearing” before an impartial tribunal, for all individuals whose claim for unemployment benefits is denied. *Camacho v. Bowling*, (1983, ND ILL), 562 F. Supp 1012. Whether the “fair hearing” requirement has been met is determined under the same standards as constitutional procedural due process. *Id. Citing Ross, Supra at 1318 N4. See Also Wilkinson v. Abrams*, 627 F 2d 650, 653 (3rd Cir, 1980); *Carmona v. Sheffield*, 475 F. 2d 738, 739 (9th Circuit, 1973). *Goldberg v. Kelly*, 397 U.S. 254, 268.

A fundamental requirement of procedural due process in the context of an unemployment hearing is adequate notice of the claims of adverse parties and the opportunity to meet them. Adequate notice must advise a claimant of the facts and evidence on which an agency intends to act, in order that the claimant may adequately prepare and present a defense and/or response. *Camacho, Supra @ 1020, citing Hess & Clark, Division of Rhodia, Inc. v. Food and Drug Administration* 161 U.S. APP D.C. 395 (DC Cir. 1974). 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).

In *Ruffalo*, an attorney facing disbarment proceedings was notified of thirteen separate

charges that would be considered by the disciplinary committee. During the hearing, a previously undisclosed fourteenth issue came to light during the attorney's testimony. The committee then proceeded to inquire further into this fourteenth issue as well as the previous thirteen charges. After the hearing, the committee entered an order of disbarment against Ruffalo, relying in part on the fourteenth issue. Ruffalo had no advance notice that the fourteenth issue would be considered at his hearing. The United States Supreme Court, on review, held that the "absence of fair notice as to the reach of the grievance procedure and the **precise nature of the charges** deprived petitioner of procedural due process." 88 S. Ct. @ 1226. (Emphasis added).

The Eighth Circuit reached a similar conclusion in *Navato v. Sletten*, 560 F.2d 340 (8th Cir. 1977). In this case, a teaching hospital advised an intern that he faced a disciplinary hearing concerning his performance, including a lack of concern for patients, over scheduling, improper record keeping and poor judgment. At the hearing, however, the hospital raised other concerns, including the interns alleged fostering of discontent among other students, a failure to cooperate in "on call" scheduling, and alleged statements indicating the intern hoped to be terminated from the program rather than resign, in order to avoid the payback provisions of his contract. After the hearing, the hospital placed the intern on probation and required him to repeat part of his training. On appeal, the Eighth Circuit found that because he was not given prior notice of the **precise issues** to be determined at his hearing, his procedural due process rights were violated. The Court observed "since the right to be heard is of little value unless one is informed as to the matter which is pending, procedural due process requires that some kind of prior notice be given." *Id.* at 346.

In an unemployment context, the *Camacho* Court reasoned that "*Ruffalo and Navato*

establish that adequate notice must identify the **precise issues** to be raised so that a specific, responsive, and complete defense may be presented”. *Supra at 1021*. (Emphasis added) In *Camacho*, Steven Flowers and Carmen Camacho were named plaintiffs in a class action suit against the Illinois Department of Labor and others. Both named plaintiffs appealed a denial of unemployment benefits premised on their inability at the hearing, without any prior notice, to demonstrate compliance with Illinois’ “available and actively seeking work” requirement for unemployment benefits. Flowers was notified that his hearing would consider his reasons for leaving his job, and Camacho was notified that her hearing would consider whether she was guilty of misconduct. Neither plaintiff received prior notice that the “available for and actively seeking work” requirement would be an issue to be decided at the hearing. The plaintiffs had filed bi-weekly reports with the Department of Labor listing each place they’d applied for work, and apparently believed that issue had already been resolved in their favor. In both administrative hearings, the referee determined that the claimants were eligible to receive unemployment benefits based on the reasons for separation from employment. Flowers had a medical reason to quit working, and Camacho was not guilty of misconduct. However, the referee then required each plaintiff to demonstrate compliance with Illinois’ requirement that a claimant be available for and actively seeking work. The bi-weekly reports plaintiffs filed with the Department of Labor were not available to the Referee, nor were they available to plaintiffs at the hearing. Plaintiffs were expected to recall, on the spot, numerous company names and addresses where they’d applied for work over the weeks and months prior to the administrative hearing. Neither plaintiff was able to recall sufficient details to persuade the Referee that they’d been “available for and actively seeking work”, and he denied their claims for unemployment benefits for that reason. The Court,

citing *Matthews v. Eldridge*, 424 U.S. 319, 96 S Ct 893 (1976) applied a three prong test in evaluating plaintiffs procedural due process claim:

1. *The private interest that will be effected by the official action.*
2. *The risk of erroneous deprivation and the probable value, if any, of additional or substituted procedural safeguards; and*
3. *The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail.*

Camacho, Supra at 1023-1024. The Court found the private interest a claimant has in receiving unemployment benefits to be high, considering the need for a steady source of income to support family, health, and home. The risk of erroneous deprivation is high especially where an unprepared claimant, possibly uneducated, finds himself before a Referee demanding specific answers to detailed questions claimant had no reason to believe would be at issue in his hearing. The fiscal and administrative burdens imposed on the government are minimal. Two additional sentences in the Notice of Hearing provided to the plaintiffs would have provided adequate notice to them that the "available for and actively seeking work" requirement would be considered at the hearing. The Court then held that the Illinois Department of Labor had violated plaintiff's rights to procedural due process by failing to provide them with adequate notice of the **precise issues** to be decided at the administrative hearing. Remedies were to be considered in the second part of the case.

In this case, Collins did not receive adequate notice of the **precise nature** of the charges against her. Applying the *Matthews* test, as the *Camacho* Court did, this Court should find that Collins has a strong private interest in receiving her unemployment benefits. As recognized in §71-5-3, *Miss. Code Ann.*, a stable source of income is necessary to secure the health, morals, and

welfare of the people of this state:

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

The risk of erroneous deprivation is high, because Collins had no opportunity to prepare a response to the actual charges against her, was initially denied by the claims examiner for absenteeism without notification, and then the administrative law judge denied her claim for benefits for a completely different reason that was never identified in the Notice Collins received. Worse, the notices Collins received were misleading, in that either the administrative law judge would consider only the issue of absenteeism, or that the administrative law judge would consider any possible reason she might be ineligible to receive unemployment benefits. Had Collins received notice of the **precise nature of the charges** against her, she could have produced additional witnesses, prepared additional lines of questioning for the witnesses against her, and presented legal argument addressing the non-noticed issues.

The fiscal and administrative burden on MDES would be minimal. Their own regulations, as well as 42 U.S.C. §503(a)(3), require that claimants be given adequate and fair notice of the issues to be determined at an administrative hearing. A few sentences added to the

Notice of Telephone Hearing would have sufficed to inform Collins that she was accused of more than mere absenteeism without notice to her employer. Collins has a strong interest in receiving her unemployment benefits, the risk of erroneous deprivation is high, and the fiscal and administrative burden that would be imposed on MDES is minimal, therefore this Court should find that MDES violated Collins' right to procedural due process by failing to provide her with adequate notice of the **precise charges** against her. This Court should reverse the decision of the Circuit Court of Monroe County, declare the notice provided was inadequate as a matter of law, and award unemployment benefits to Collins retroactive to February 17, 2009.

Whether a single instance of absenteeism without notice to the employer meets the definition of "misconduct" within the meaning of unemployment law?

This Court has defined misconduct as applied to unemployment cases:

"The meaning of the term 'misconduct', as used in the Unemployment Compensation Statute, was conduct evidencing 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 a right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent, or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertencies and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute."

Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982). Applying that definition, this court has held that an employee who reasonably believed her employment had been terminated did not commit misconduct by failing to report to work thereafter. *See Huckabee v Mississippi Employment Security Commission*, 735 So 2d 290 (1999). Further, this Court has held that a single incident is insufficient to disqualify a terminated employee from receiving unemployment benefits for

misconduct. *Mississippi Employment Security Commission v. McClane-Southern, Inc.*, 583 So. 2d 626. (1991). Likewise, the Mississippi Court of Appeals has held that a single incident is insufficient to disqualify a terminated employee from receiving unemployment benefits for misconduct. See *Acy v. Mississippi Employment Security Commission*, 960 So. 2d 592 (COA 2007) and *Gordon v. Mississippi Employment Security Commission*, 864 So. 2d 1013, (COA 2004).

In *Huckabee*, the claimant expressed dissatisfaction with her working conditions, and indicated to her supervisor that she would be seeking other employment. Huckabee did not resign, told her supervisor she would continue to work as long as she could, and told her that she would give two weeks notice prior to quitting. Her supervisor then told Huckabee that the company would hire someone else. Huckabee, believing she had been terminated at that point, stopped reporting to work and filed her claim for unemployment benefits. The Court held that Huckabee reasonably believed she had been terminated at the point that the supervisor told her she'd hire someone else, reversed the trial court decision, and remanded the case for a determination of benefits to be paid to Huckabee. *Huckabee, Supra*. In the case *sub judice*, Collins reasonably believed she was not required to work on President's Day, 2009. Business was slow, due to the holiday, and Collins was told she'd be called by her supervisor if Collins was required to work. No call came, so Collins did not work. Collins returned to work on Tuesday after the Monday holiday. (Transcript, Administrative record, @ 70-72). If, under *Huckabee*, it is not misconduct to fail to report to work after reasonably believing one has been terminated, then logically, it cannot be misconduct to fail to report to work after reasonably believing one was not required to work that particular day.

In *McClane-Southern*, the employee was discharged for being involved in a fight at work. The claimant was coming down some stairs when another employee attacked her with a box cutter. The claimant defended herself by grabbing the attacker's arm to prevent herself from being cut or stabbed. Both employees were terminated for fighting at work in violation of the employer's policies. The claimant then filed for unemployment benefits. The Board of Review awarded her benefits, and the employer appealed to the Circuit Court of Lincoln County. That Court reversed the Board of Review decision, and denied claimant's benefits, finding her guilty of misconduct. The claimant then appealed to this Court, which held:

*Moreover, we hold that, regardless of the sufficiency of the proof offered by the employer, the fact that an employee has been involved in an isolated fight with a fellow employee at the workplace, standing alone, is not "misconduct" within the meaning of section 71-5-513(A)(1)(b) so as to disqualify that person from receiving [*629] unemployment benefits should that person be discharged as a result of the fight.*

McClane-Southern, Supra at 628. Returning to the case at bar, even if Collins had received proper notice of the precise nature of the charges against her, an isolated verbal altercation at work, from an exemplary employee with no prior incidents, is insufficient to support a finding of misconduct within the meaning of the statute and cases as a matter of law.

In *Acy*, the claimant, Kathi L. Acy, was a greeter at Wal Mart. Part of her job was to stop any customer that caused the security alarm to sound while attempting to leave the store, and verify that the customer had a receipt to prove the customer had purchased the items the customer was attempting to remove from the store. On February 10, 2005, the alarm sounded and Acy stopped the customer to inspect her receipt. The customer became irate and snatched the receipt out of Acy's hand before she could complete her inspection. Acy then used profanity under her breath while returning to her station. The customer complained to management. Acy admitted

using profanity, but said she did not direct the profanity at the customer. Acy was then fired from her job for a single incident of using profanity in front of a customer. She applied for unemployment benefits, and was awarded benefits by the administrative law judge. The employer then appealed to the Board of review, which reversed the administrative law judge, and denied benefits to Acy, finding her guilty of misconduct. Acy then appealed to the Circuit Court of Rankin County, which affirmed the Board of Review, and Acy then appealed that decision to the Court of Appeals, which held:

*However, accepting that Acy's conduct was a violation of Wal-Mart's policies and procedures, thus justifying her termination, it is the opinion of this Court that her actions do not amount to disqualifying misconduct as defined by Mississippi case law, as an isolated incident of misconduct by [an] employee does not generally disqualify [the employee] from receiving the benefit of unemployment compensation." Daniels v. Miss. Empl. Sec. Comm'n, 904 So. 2d 1195, 1197 (P9) (Miss. Ct. App. 2004) (citing Gore v. Miss. Empl. Sec. Comm'n, 592 So. 2d 1008, 1011 (Miss. 1992)). Thus, we reverse the circuit court's finding that Acy committed disqualifying conduct within the meaning of Mississippi Code Annotated section 71-5-513A(1)(b) [**10] (Supp. 2006), as construed by the court in Wheeler.*

Acy, Supra at P. 19.

Again, returning to the case at bar, Collins was an exemplary employee with no prior incidents. Her supervisor, Ms. Davis, admitted as much in her testimony before the administrative law judge:

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 just all a misunderstanding, I guess.

Administrative Record, Page 77. A misunderstanding indeed, and one which cost Collins her job and the unemployment benefits rightfully due to her. It is unfortunate that this incident led to the discharge of a good and dutiful employee, but such is within the discretion of her employer.

However, this incident lacks the culpability required to disqualify Collins from receiving unemployment benefits for misconduct.

In *Gordon*, the claimant worked in the laundry at a hospital. His supervisor caught him bringing soiled linen in through the door reserved for clean linen, in violation of the hospital's policy and procedures. When confronted about the transgression, he used profanity directed at his supervisor, to the effect that he was tired of this manager telling him what to do, and if he wanted to bring the manager through the other door, he would. The supervisor reported the incident to management, and Gordon was terminated for the incident. Gordon applied for benefits, his claim was denied by the Board of Review, he appealed to the Circuit Court of Lauderdale County, which affirmed, and he then appealed to the Court of Appeals, which held:

*P26. Again, as we have noted elsewhere in this opinion, the record of the hearing contains not one scintilla of evidence relating to the employer's policy, if indeed it had one, on the consequences of an employee's use of profanity in the workplace, directed to a superior or anyone else. Even if there were, the evidence is clear that this was a single, isolated incident of using profanity. Gordon had no prior incidents. Moreover, while the profanity incident was characterized as an act of insubordination, the record does not clearly support that characterization. It is not clear whether Gordon had already moved the dirty linen through the clean linen door when Edwards confronted him. Based on one portion of Edwards's testimony, one can conclude that he had not already gone through the clean linen door when she confronted him, [**17] yet portions of his supervisor's testimony seem to indicate that she confronted him after discovering that he had already moved the dirty linen. However, whether he had or had not done so is not outcome determinative because again, this would be a single incident of insubordination.*

P27. We acknowledge that HN10Go to the description of this Headnote.insubordination does fall within the scope of misconduct as it relates to unemployment compensation cases.is defined as "a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority." Gore v. Miss. Employment Sec. Comm'n, 592 So. 2d 1008, 1010 (Miss. 1992) (quoting Sims v. Bd. of Trustees, Holly Springs

Mun. Separate Sch. Dist., 414 So. 2d 431, 435 (Miss. 1982)). HN12Go to the description of this Headnote. "Insubordination may amount to misconduct." *Young v. Miss. Employment Sec. Comm'n*, 754 So. 2d 464, 466 (P7) (Miss. 1999).

*P28. There is no substantial, clear and convincing evidence that Gordon constantly, continually and intentionally disobeyed a direct order from his supervisor. There is evidence that he may have done so on one occasion, but that one occasion does [**18] not rise to the level of insubordination as defined in Gore.*

P29. We do not question that the employer had a legitimate basis for terminating Gordon, but a termination for cause does not necessarily mandate that unemployment benefits be denied. Misconduct giving rise to a denial of unemployment compensation benefits must meet the requirements of Wheeler.

Gordon, Supra at P27-P29.

It is clear that a single incident of using profanity to a supervisor, even if characterized as insubordination, does not qualify as misconduct sufficient to disqualify a claimant from receiving unemployment benefits. Collins may have used some mild profanity towards Ms. Davis, her supervisor, when accused of missing a scheduled shift. Collins honestly did not believe she was required to work that shift, and believed she was being unjustly berated for an incident that was not her fault. Tempers apparently flared on both sides. Arguably, the employer was within their rights to terminate Collins after the verbal altercation, but given that this was the only blemish on an otherwise spotless record of performance, the incident simply does not rise to the level of misconduct as defined under Mississippi law. This Court should reverse the decision of the Circuit Court of Monroe County, declare that the Notice provided was inadequate as a matter of law, and render judgment in favor of Collins, awarding her unemployment benefits retroactive to February 17, 2009.

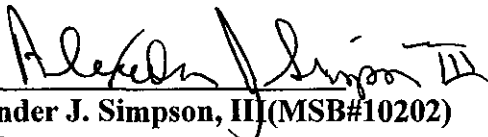
Conclusion

Unemployment benefits are a property interest protected under the Fifth and Fourteenth Amendments to the United States Constitution, Article 3 §14 of the Mississippi Constitution, 42 U.S.C.S. §503(a)(3), 42 U.S.C. 1983, and MDES Regulation 200.02 (B)(1) (c). As such, Collins is entitled to the protections of procedural due process, which includes the opportunity to have a fair hearing, before an impartial tribunal, to determine whether she is eligible to receive unemployment benefits. It is not possible to have a fair hearing, consistent with the requirements of procedural due process, without advance notice of the **precise nature** of the charges or issues to be determined at the hearing. Collins did not receive such notice. She received notice that her claim was denied for absenteeism without notice to the employer. Not only was this notice incomplete, it was also misleading, in that Collins was led to believe that the only issue the administrative law judge would consider at her hearing was whether she was or was not absent without notice to her employer. She was prepared to defend against that charge. At the hearing, the administrative law judge heard testimony that she was not actually discharged for absenteeism, but instead was discharged for arguing with Ms. Davis. The administrative law judge then disqualified her from receiving benefits for misconduct arising out of the argument. A claimant cannot be given notice of one reason for a denial of benefits, and then later be denied benefits for a completely different reason, where she had no notice that the completely different reason would be considered. This is a clear violation of Collins' right to procedural due process. It is important to note for future cases that unduly vague notices such as that provided here "Whether the claimant is entitled to benefits based on the reason for separation from employment" is tantamount to no notice at all. It does not even satisfy notice pleading requirements, much less the procedural due process requirements for a fair hearing. All claimants for unemployment benefits

are entitled to notice of the **precise nature of the charges** against them.

Even if Collins had received proper notice of the charges against her, and the testimony at the administrative hearing is considered in the light most favorable to her employer, a single incident of absenteeism or arguing with her supervisor is insufficient to support a finding of misconduct as a matter of law. This Court should reverse the decision of the Circuit Court of Monroe County, declare that the Notice provided was inadequate as a matter of law, and award unemployment benefits to Collins retroactive to February 17, 2009.

**RESPECTFULLY SUBMITTED,
BERTHA COLLINS, APPELLANT**

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