

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

CASE NO. 2010-TS-00729

KARL WEEDEN

APPELLANT

VS.

CASE NO. 2010-TS-00729

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

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

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

ORAL ARGUMENT NOT REQUESTED

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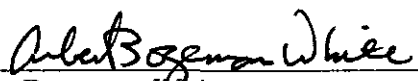
APPELLEE

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, MDES
3. LeAnne F. Brady, Senior Attorney for Appellee, MDES
4. Karl Weeden, Appellant
5. Honorable Albert B. Smith, Circuit Court Judge

This the 14th day of October, 2010.



Albert Bozeman White
Assistant General Counsel (MSP # [REDACTED])
Mississippi Department of Employment Security

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STATEMENT OF ISSUE

Whether the Circuit Court and Board of Review decisions should be affirmed, finding that the Claimant, Karl Weeden, failed to timely file his appeal to the Board of Review, pursuant to *Mississippi Code Annotated* Section 71-5-517.

STATEMENT OF THE CASE

Karl Weeden [hereafter also referred to as "Claimant"] was employed with Tunica County, Mississippi [hereafter also referred to as "Employer"], until his discharge on July 21, 2008. (R. Vol 2 p. 1). Mr. Weeden filed an Initial Claim for unemployment benefits on August 20, 2008. (R. Vol 2 p. 1). After investigation, on November 18, 2008, a Claims Examiner determined that the Claimant was disqualified from receiving benefits due to misconduct connected with his work. (R. Vol 2 p. 16-18).

On November 21, 2008, the Claimant appealed. (R. Vol 2 p. 20). A hearing before the Administrative Law Judge [hereinafter also referred to as the "ALJ"] was held on February 25, 2009, at which the Claimant and an Employer Representative participated. (R. Vol 2 p. 34-70). Based upon the testimony and evidence, the ALJ found the Claimant was disqualified from receiving benefits for misconduct connected with his work. (R. Vol 2 p. 74-76). *Mississippi Code Annotated* Section 71-5-513A (1)(b).

The ALJ's Findings of Fact and Opinion were as follows, to wit:

FINDINGS OF FACT

The claimant worked as a carpenter for six and one half years with Tunica County, Tunica, Mississippi. He was discharged on July 28, 2008, for violation of known company policy.

The claimant received several warning (sic) during his employment. On March 12, 2008, he received a warning for sleeping on the job. On April 4, 2008, he received a warning for sleeping on the job. The supervisor and the manager had seen the claimant sleeping on the job on several occasions.

On April 11, 2008, he received a final written warning for sleeping on the job, not following instructions, bad attitude, not getting along well with fellow employees especially management, goofing around, excessive bathroom breaks, and not adapting to change. Rather than discharge, the employer gave him one more chance.

He received another warning on July 15, 2008, but was not discharged. On July 22, 2008, he and the supervisor had a verbal disagreement about the claimant not

following reasonable instructions of the supervisor. This was the last incident the employer would tolerate.

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, and for each week thereafter until he has earned remuneration for personal services equal to not less than eight times his weekly benefit amount as determined in each case. Section 71-5-513 A (1) (c) provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.

Section 71-5-355 of the Mississippi Employment Security Law provides, in part, that an employer's experience rating record shall be chargeable with benefits paid to a claimant, provided that an employer's experience rating record shall not be chargeable if the Department finds that the claimant left work voluntarily without good cause connected with the work, was discharged for misconduct connected with the work, or refused an offer of available, suitable work with the employer.

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

"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 the 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 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."

The claimant's actions constitute misconduct. Each case requires careful analysis to determine if misconduct occurred. In some cases a single incident is of such magnitude to constitute misconduct. In other cases it is a series of events that constitute misconduct.

In this case it was a series of events over a long period of time. The claimant was told that if his behavior continued he would be terminated. He received two more warnings and was terminated.

DECISION

The decision of the Claims Examiner is affirmed.

Dated and mailed 03/05/2009.

(R. Vol 2 p. 74-75).

Regarding the timeliness of appeal issue in this matter, the ALJ's March 5, 2009 decision informed Mr. Weeden of his appeal rights, stating in pertinent part:

This decision will become final on **03/19/2009**, which is fourteen (14) calendar days from the date this decision was mailed, unless you file an appeal with the Board of Review and/or request a hearing of the case by **03/19/2009**.

(R. Vol 2 p. 76). However, Mr. Weeden failed to timely file his appeal within the fourteen day deadline. Mr. Weeden did not appeal until **October 12, 2009**. (R. Vol 2 p. 77).

After filing his appeal, this matter came before the Board of Review. On November 19, 2009, the Board of Review dismissed the Claimant's appeal as untimely, finding that the decision of the ALJ had become final. (R. Vol 2 p. 82).

Mr. Weeden then appealed to the Circuit Court of Tunica County, Mississippi. (R. Vol. 1 p. 4-5). Subsequently, MDES filed its Answer and the Record Transcript. (R. Vol.1 p. 17-18, 22). Prior to the Claimant or MDES filing Briefs, the Circuit Court affirmed the Board of Review's decision on April 14, 2010. (R. Vol. 1 p. 24). Apparently not being aware of this decision, the Claimant and MDES both filed Briefs. (R. Vol 1. p. 25-31, 33-40, 41-46). The Claimant also appealed on May 14, 2010, to this Honorable Court. (R. Vol. 1 p. 32).

SUMMMARY OF THE ARGUMENT

The applicable statute in this case, *Mississippi Code Annotated* Section 71-5-517, provides that a claimant or employer who disagrees with Administrative Law Judge's decision, has fourteen (14) calendar days from the date it was mailed to appeal such decision. Wilkerson v. Miss. Emp. Sec. Comm'n., 630 So. 2d 1000 (Miss. 1994).

In this matter, the ALJ's decision was mailed on March 5, 2009. The ALJ's decision was mailed to Mr. Weeden at the mailing address he provided on his initial claim form, and at which he received all prior communications from MDES. (R. Vol. 2 p. 74-75). The ALJ's decision also clearly informed Mr. Weeden that he had fourteen days from the date the decision was mailed to appeal to the Board of Review. (R. Vol 2 p. 76). The deadline for Mr. Weeden to file his appeal was March 19, 2009. However, Mr. Weeden did not file his appeal to the Board of Review until October 12, 2009.

The uncontroverted evidence establishes that Mr. Weeden's appeal was approximately seven (7) months late. As noted by the Circuit Court, Mr. Weeden also has not offered any explanation, or presented good cause, for his untimely appeal. (R. Vol. 1 p. 24). Thus, the Circuit Court and Board of Review's decisions are correct and should be affirmed.

ARGUMENT

The provisions of Section 71-5-531, *Mississippi Code Annotated* of 1995 (Revised 2009) provides for an appeal by any party aggrieved by the decision of the Board of Review. That section provides that the **appeals court shall consider the record made before the Board of Review of the Mississippi Employment Security Commission, 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. Miss. Emp. Sec. Comm'n.*, 593 So. 2d 31 (Miss. 1992); *Barnett v. Miss. Emp. Sec. Comm'n.*, 583 So. 2d 193 (Miss. 1991); *Wheeler v. Arriola*, 408 So. 2d 1381 (Miss. 1982).

In *Barnett*, the Mississippi Supreme Court stated that:

{J}udicial review, under *Mississippi Code Annotated* 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, if the Board's findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing court must affirm. *Id.* 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 must not reweigh facts nor insert its judgment for that of the agency. *Allen*, 639 So. 2d at 906.

In addition, *Mississippi Code Annotated* Section 71-5-519 sets forth the applicable appeal time providing, in pertinent part, to wit:

The parties shall be duly notified of such tribunal's decision, together with its reasons therefore, which shall be deemed to be the final decision of the executive director **unless, within fourteen (14) days after the date of notification of such decision, further appeal is initiated** pursuant to Section 71-5-523.

Mississippi Code Annotated Section 71-5-519 (Emphasis added).

Pursuant to this statute, Mr. Weeden was afforded all of the notice to which he was entitled; and his appeal to the Board of Review was not timely filed. Since notification was sent by mail to his correct address, the case of Wilkerson v. Miss. Emp. Sec. Comm'n., 630 So. 2d 1000 (Miss. 1994), is on point; and controls as to calculating the appeal deadline. In Wilkerson, the Mississippi Supreme Court held that when notification is by mail, the fourteen day time period began running from the mailing date. Id. at 1002. Furthermore, while holding that an appeal filed **one** day late was untimely, the Court stated that the fourteen-day time period as set by statute is to be strictly construed. Id. (Emphasis added).

Further, in Holt v. Miss. Emp. Sec. Comm'n., 724 So. 2d 466 (Miss. Ct. App. 1998), the Court addressed the good cause issue, stating that good cause for late filing of an appeal must be established by affirmative proof. The Court, in Holt, also indicated that a "good cause" showing must provide sufficient legal basis to excuse the late filing. See Maxwell v. Miss. Emp. Sec. Comm'n., 792 So. 2d 1031 (Miss. Ct. App. 2001) (where claimant waited until after his dishonorable discharge was changed to an honorable discharge to file appeal, good cause was not shown for appealing untimely); Powell v. Miss. Emp. Sec. Comm'n., 787 So. 2d 1277 (Miss. 2001) (Circuit Court's allowance of untimely appeal based upon claimant's assertion of "unforeseen circumstances" was insufficient proof of good cause); Cane v. Miss. Emp. Sec. Comm'n., 368 So. 2d 1263 (Miss. 1979) (where notice is not mailed to the last known address, good cause for late filing is shown); City of Tupelo v. Miss. Emp. Sec. Comm'n., 748 So. 2d 151 (Miss. 1999) (City did not show good cause for filing an appeal late simply because the notice was mailed to one of several addresses for the City); Miss. Emp. Sec. Comm'n. v. Parker, 903

So. 2d 42 (Miss. 2004) (Rules of Civil procedure do not apply to MDES, such that whether Parker's appeal was untimely was governed by MDES statutes).

Mr. Weeden never disputes that he did not file his appeal in a timely manner. In his appeal to the Board of Review he simply states "I want to file the appeal." (R. Vol 2 p. 78). However, he offers no explanation as to his reason for being late in filing his appeal to the Board of Review.

At the conclusion of the hearing, the ALJ states that each of the parties should receive a copy of the decision within 10 days to two weeks. (R. Vol 2 p. 70). The decision was mailed to the parties on March 5, 2009. (R. Vol 2 p.74). This decision specified that an appeal by Mr. Weeden must be filed by March 19, 2009. However, Mr. Weeden did not appeal until October 12, 2009, almost seven (7) months later. (R. Vol. 2 p. 77).

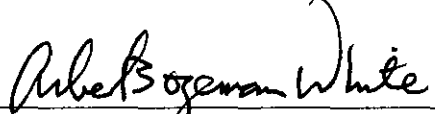
Mr. Weeden has not presented any proof establishing that he had good cause for appealing untimely. Further, Mr. Weeden does not complain that he did not receive the ALJ's decision timely. Additionally, even though the Board of Review dismissed his appeal as being untimely, Mr. Weeden does not attempt to address that fact in either his Notice of Appeal or his Briefs. Thus, the Circuit Court and Board of Review correctly concluded that Mr. Weeden appealed untimely and failed to show he had good cause for filing his appeal late.

CONCLUSION

Mr. Weeden offers no reason why he was late filing his appeal to the Board of Review. Furthermore, there is no question that his appeal was not made timely; and he never disputes the Board of Review's dismissal of his appeal as untimely. Thus, there is substantial evidence to support the decision of the Board of Review in holding Mr. Weeden did not timely file his appeal, and since the law was appropriately applied to the facts and supports the Board's decision, this Honorable Court should affirm the decision of the Circuit Court and Board of Review in this matter.

RESPECTFULLY SUBMITTED this the 14th day of October, 2010.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY,


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CERTIFICATE OF SERVICE

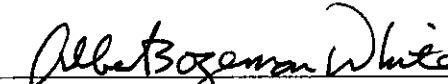
I, Albert Bozeman White, Attorney for the Mississippi Department of Employment Security, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following:

Mr. Karl Weeden
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Tunica, MS 38676-9609

Honorable Albert Smith
P.O. Drawer 478
Cleveland, MS 38732

Ms. Kathy Gillis
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205

On this the 14th day of October, 2010.


Albert Bozeman White