**IN THE SUPREME COURT OF MISSISSIPPI**
**CASE NO: 2010-CC-01766**

**SUSAN MASK** **APPELLANT**

**VS.** **CASE NO: 2010-CC-01766**

**MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND TOWNHOUSE HOME FURNISHINGS LLC** **APPELLEES**

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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

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## 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. LeAnne F. Brady, Senior Attorney for Appellee
3. Susan Mask, Claimant/Appellant
4. Carter Dobbs, Jr., Esq., Attorney for Appellant
5. Townhouse Home Furnishings, LLC, Employer/Appellee
6. Honorable James S. Pound, Circuit Court Judge

This the 12th day of August, 2011.

LeAnne F. Brady
Senior Attorney (MSB [redacted])
Mississippi Department of Employment Security

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## STATEMENT OF THE ISSUE

Whether the Board of Review's decision should be affirmed finding that the Employer, Townhouse Home Furnishings, proved by substantial evidence that the Claimant, Susan Mask, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(2010), by willfully and wantonly violating the Employer's reasonable standards of behavior regarding performance of her sewing job duties, after being repeatedly counseled.

## STATEMENT OF THE CASE

Susan Mask [hereinafter also referred to as "Claimant"] was employed by Townhouse Home Furnishings, a furniture manufacturer, [hereinafter also referred to as "Employer"] from January 10, 2006, until September 8, 2008, when she was discharged. (R. Vol. 3, p. 9-10, 31). She was employed as a seamstress in the chair sewing department, sewing pre-cut patterns of fabric onto chairs and loungers. She was terminated for repeatedly failing to follow her supervisor's instructions regarding sewing assignments, and for recurring errors and unsatisfactory performance, after being repeatedly counseled. (R. Vol. 3, p. 9-10, 30-44).

Ms. Mask was counseled by her supervisor, Tina West, on at least five occasions. She was warned in April of 2008, about sewing patterns incorrectly on Model 6200 chaise loungers. Two months prior to the final incident, she again sewed the backs on Model 1200 love seats upside down. Each time she forced the pattern to fit incorrectly, which was obvious upon inspection. There were also other occurrences. Each time she was counseled; showed the correct way, and was made to re-sew the furniture. On September 8, 2008, the date of the final incident, she sewed fifty patterns on Model 6200 chaise loungers backwards, which the error was obvious due to the puckering of the material. This lounger was identical to the model she sewed incorrectly in April 2008. (R. Vol. 3, p. 30-44).

Ms. Mask had previously demonstrated the ability to do her job, and was repeatedly warned, warned, but continued to disregard the employer's instructions. Ms. Mask continued to make the the same apparently careless errors, which resulted in her discharge.

After the job separation, Ms. Mask filed for unemployment benefits. (R. Vol. 3, p. 1). A Claims Examiner investigated by interviewing an Employer Representative and Ms. Mask. (R. Vol.

Vol. 3, p. 7-11). The Employer Representative stated that Employer Policy provided that an employee may be discharged upon a third occurrence, after two warnings. (R. Vol. 3, p. 9-10). She She initially demonstrated the ability to do the job, but made careless errors. She was warned twice twice prior to a third occurrence. Ms. Mask admitted making errors, but claimed she was laid off off due to lack of work. (R. Vol. 3, p. 10-11). Based upon the information obtained, the Claims Examiner found that the Claimant's behavior constituted misconduct and disqualified Ms. Mask for for her continued failure to perform her job duties up to the employer's standards, after warnings. (R. (R. Vol. 3, p. 13-14).

Ms. Mask appealed to the MDES Administrative Law Judge [hereinafter also "ALJ"]. (R. Vol. 3, p. 17). A hearing was scheduled and held on February 20, 2009. (R. Vol. 3, p. 21-26, 27-61). Ms. Mask participated and was represented by Attorney, Carter Dobbs. Claimant's supervisor, Tina West, acted as the Employer Representative and testified, along with one witness, Donna Thompson. Afterwards, the ALJ affirmed the Claims Examiner's decision, and held that Ms. Mask's unsatisfactory job performance, after warnings, constituted misconduct. (R. Vol. 3, p. 62-64).

Ms. Mask appealed to the MDES Board of Review. (R. Vol. 3, p. 65-67). After carefully reviewing the record, the Board of Review affirmed the ALJ's decision, adopting the ALJ's fact findings and opinion. (R. Vol. 3, p. 69).

The ALJ's Fact Findings and Opinion 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 from January 07, 2007 to September 08, 2008 as a sewing operator with Townhouse Home Furnishings LLC, Smithville, Mississippi. She was discharged for failing to perform work to the employer's standards.

The final incident occurred on September 08, 2008. The claimant sewed all the rails backwards on 50 chaise loungers. She had a pattern to go by and neglected to follow it properly. She gave no explanation to the employer for her faulty work. She had been verbally warned for this same type of faulty work in April 2008.

About two months prior to discharge, the claimant sewed about 50 love-seat backs improperly. She improperly pulled the backs on the love-seat causing the backs to sag. She knew from experience that her work was faulty. She gave the employer no explanation for her faulty work.

In April 2008, the claimant sewed rails backwards on chaise loungers. The employer issued the claimant several other verbal warnings regarding the quality of her work.

The claimant had shown the ability to perform the work up to the employer's standards.

The claimant received Unemployment Insurance benefits from weeks ending September 20, 2008 to December 13, 2008 in the total amount of $2,990.00.

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,...

Section 71-5-355 of the Mississippi Employment Security Law provides, in part, 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. (sic) 2d 1381 (Miss. 1982), the Court held that:

"The meaning of the term 'misconduct', as used in the Unemployment Compensation Compensation Statute, was conduct evidencing such willful and wanton disregard of

> 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. employees. Also, carelessness and negligence of such degree, or recurrence thereof, 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....
>
> The claimant was discharged for failing to perform work up to the employer's standards. She had been warned regarding her faulty work. Her actions resulted in financial loss to the employer because her work had to be re-done. The Law provides that carelessness and negligence of such a degree or recurrence thereof to manifest culpability is considered misconduct. The claimant's actions constituted misconduct connected with the work as that term is used in the Law.
>
> The Department's determination is in order. The overpayment associated with this case is sustained.
>
> Decision:
>
> Affirmed. The claimant is disqualified beginning September 09, 2008, and until she has been re-employed in covered employment and earned eight (8) times her weekly benefit amount, or $1,840.00. The claimant is obligated to repay the assessed overpayment plus any interest that may accrue on the unpaid balance. The employer's experience rating record is entitled to a non-charge based on this issue.

(R. Vol. 3, p. 62-64).

The Claimant then appealed to the Circuit Court of Monroe County. (R. Vol. 1, p. 9). Both Both parties submitted briefs for the court's consideration. (R. Vol. 1, pp. 18-76). On October 6, 6, 2009, the Honorable Jim Pounds entered an Order affirming the Board of Review, finding that the the Board's decision was, "supported by substantial evidence, was not arbitrary, and contains no errors of law." The Claimant filed a Motion to Alter or Amend the Judgment on November 2, 2009. 2009. (R. Vol. 1, p.82). MDES filed its response to this Motion on November 10, 2009. (R. Vol. 1, Vol. 1, p. 87). A hearing was held on August 25, 2010, on the Appellant's Motion to Alter or Amend the Judgment. (R. Vol. 1, p. 90). After considering the briefs and oral arguments presented

presented by the parties, Judge Pounds entered an Order denying the Claimant's motion on September 27, 2010. (R. Vol. 2, p. 92). The Claimant then perfected her appeal to this Honorable Honorable Court. (R. Vol. 1, p. 93).

## SUMMARY OF THE ARGUMENT

The case authorities establish that repeated, negligent unsatisfactory job performance, after warnings, rises to the level of disqualifying misconduct. See Shavers v. Miss. Emp. Sec. Comm'n., 763 So. 2d 183 (Miss. Ct. App. 2000)(repeated disregard of job duties after warnings may rise to the level of misconduct.); Kellar v. Miss. Emp. Sec. Comm'n., 756 So. 2d 840 (Miss. Ct. App. 2000)(pattern of errors in job performance and refusal to comply is misconduct); Reeves v. Miss. Emp. Sec. Comm'n., 806 So. 2d 1178 (Miss. Ct. App. 2002)(failure to clean up parts after repeated instructions is misconduct); Johnson v. Miss. Emp. Sec. Comm'n., 767 So. 2d 1088 (Miss. Ct. App. 2000)(postal workers failure to complete route after being instructed to do so is misconduct).

In the instant case, Ms. Mask failed to heed the Employer's warnings regarding the performance of her sewing job duties. In that regard, Ms. Mask was counseled by her immediate supervisor, Tina West, on several occasions. She was shown the correct way to sew; and corrected errors. She actually re-sewed the incorrectly sewn furniture.

Ms. Mask was aware that the performance of her job was unsatisfactory, but failed to pay attention to her work and improve. She also should have been aware that her job was in jeopardy, after repeated warnings.

The tasks assigned required some ability, but Ms. Mask had previously demonstrated the ability to satisfactorily perform these job assignments, as described by Tina West. The last incident incident involved Ms. Mask's failure to properly sew fifty Model 6200 chaise loungers. She also had had previously sewn Model 6200 loungers improperly, been warned about that, and previously corrected her errors by re-sewing the chaise loungers. The latest incident completely shut down the

the line until the loungers were re-sewn, which required assistance from several other seamstress to to correct.

Regarding the final incident, as well as the previous incidents, Ms. Mask was provided a pattern that she sewed onto the chair backwards. Her supervisor testified that the material was puckered all around the chairs, because the pattern did not fit. Thus, the improperly sewn chairs should have been obvious to Ms. Mask long before she sewed fifty incorrectly, particularly since she had been warned previously for the same errors on the same furniture.

The record evidence substantially supports the Board of Review's finding that Ms. Mask committed disqualifying misconduct by repeatedly violating the Employer's instructions and standards of behavior regarding reasonable job duties. Thus, this Court should affirm, based upon the standard of review on appeal. Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (1992); Booth v. Miss. Emp. Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

## ARGUMENT

*I. Standard of Review*

Ms. Mask's appeal is governed by Mississippi Code Annotated Section 71-5-531 (2010), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. 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. Richardson v. Miss. Emp. Sec. Comm'n., 593 So.2d 31 (1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So.2d 193 (Miss. 1991); Booth v. Miss. Emp. Sec. Comm'n., 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. Miss. Emp. Sec. Comm'n., 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. Miss. Emp. Sec. Comm'n. v. Phillips, 562 So.2d 115, 118 (Miss. 1990).

*II. Whether the Board of Review's decision should be affirmed, finding that the Employer, Townhouse Home Furnishings, proved by substantial evidence that the Claimant, Susan Mask, committed disqualifying misconduct pursuant to Mississippi Code Annotated Section 71-5-513(A)(1)(b)(2010), by willfully and wantonly violating the Employer's reasonable standards of behavior regarding performance of her sewing job duties, after being repeatedly counseled.*

In the instant case, Tina West, Sewing Furniture Supervisor, testified first for the Employer. Employer. (R. Vol. 3, p. 30-48). Ms. West testified that she was Claimant's direct supervisor and the the Claimant worked from July 7, 2007, until September 8, 2008, in the sewing department. Id. She

She was discharged for poor work quality after numerous warnings. (R. Vol. 3, p. 31). The last incident occurred on September 8, 2008. Id. On that occasion, she sewed fifty Model 6200 chaise chaise loungers backwards. (R. Vol. 3, p. 32). Inspectors reviewed the work in the upholstery plant, plant, and caught the errors. The entire run that day was the fifty chairs; and Ms. Mask's errors necessitated sending the entire line home, apparently until the chairs were re-done.

When questioned about the incident, Ms. Mask gave no explanation for why it happened. She just apologized. (R. Vol. 3, p. 33-34).

Ms. West also testified that she showed Ms. Mask how to put the chair together. Ms. West explained that Ms. Mask's job that day was to sew one piece onto the chairs; and she sewed them all backwards. (R. Vol. 3, p. 34). Another girl was sewing the other side of the chair, which was done correctly. (R. Vol. 3, p. 36-37). The side that Ms. Mask sewed was puckered all the way around the side of the chair. The puckering meant that Ms. Mask sewed the material onto the chair in a way that it did not fit, i.e. backwards, which caused the material to pucker. This was an obvious error. (R. Vol. 3, p. 36-38). The puckering was also indicated that Ms. Mask pulled or pushed the material to make it fit, rather than just letting it lay in place. (R. Vol. 3, p. 38). Ms. West also stated that Ms. Mask knew better than to do that, because she had done them correctly before.

Ms. West was questioned about other incidents. She stated that about two months prior to this this incident, Ms. Mask sewed 1200 low seats, or love seats, wrong. She again sewed the backs wrong. This required eight or nine people to come over, unstuff the chairs, tear them down, re-sew re-sew the chairs, and put them back together. This was on a Model 1200 love seat. (R. Vol. 3, p. 35-35-36).

Ms. West also stated that Ms. Mask was warned verbally numerous times. Ms. West would counsel her, show her how to sew the chairs correctly, and then have her re-sew the chairs. (R. Vol. 3, p. 38-39). Ms. West stated that she received at least five verbal warnings prior to her termination. (R. Vol. 3, p. 39). She does not know the dates that she warned Ms. Mask, but knows it was at least five times. (R. Vol. 3, p. 40-41).

Regarding other incidents, in April of 2008, Ms. Mask sewed the material on Model 6200 chairs backwards. This was the same model as the one done wrong on September 8, 2008. She was verbally warned when the errors were discovered. She was also made to tear down the chairs and fix them. (R. Vol. 3, p. 41). Ms. West also stated that there were a total of four incidents involving incorrectly sewn Model 6200 chaise loungers, and one on the Model 1200 love seat. These incidents occurred between April and September; and Ms. Mask was given at least five warnings. (R. Vol. 3, p. 42).

Regarding the Employer's practices or policy, Ms. West stated that she usually gave someone three to four warnings before they were let go. She did not know the number of warnings specified by the policy. (R. Vol. 3, p. 42). However, the Claims Examiner's report indicated that typically two warnings were given, and upon a third occurrence, discharge may result. (R. Vol. 3, p. 9-10). Thus, Ms. West's practices were actually more lenient than the policy apparently specified.

Ms. West was questioned as to Ms. Mask's ability. She stated that Ms. Mask had the ability ability to perform the work, because she sometimes sewed the chairs correctly, and sometimes wrong. There was no explanation as to why. She would just say "I am sorry." It appeared that she she simply did not pay attention to how to do the job. (R. Vol. 3, p. 43). Ms. West also stated that

that Ms. Mask was allowed to continue working even after making errors, because some days she would do the job correctly. (R. Vol. 3, p. 44).

Ms. West was also questioned about financial loss to the Employer. She stated that there was financial loss, because five or six people had to stop what they were doing, and correct Ms. Mask's work. They also had to throw away the mis-sewed material, and sew new material on the chaise loungers. (R. Vol. 3, p. 43-44). Ms. West previously indicated that the entire line was shut down due to the last incident.

On cross-examination, Ms. West stated that there was no procedure for writing up employees and putting those write-ups in the employee's personnel file. (R. Vol. 3, p. 44). There was no rule requiring employee file notations or write-ups. She also was not aware of anything in the Employee Handbook about disciplinary measures for poor work quality. (R.p. 45-46). Ms. West was not certain of what the Employee Handbook said about reasons an employee may be discharged. (R. Vol. 3, p. 46). She also did not know if Ms. Mask had violated an employee policy by sewing the chairs incorrectly. (R. Vol. 3, p. 47).

Ms. West was questioned as to what she told Ms. Mask at the time of the warning. She stated that Ms. Mask was told that her quality was bad, and she would have to do the work right, or something would be done. Ms. West did not specifically warn her that termination would result. (R.p. 47-48).

Donna Thompson, a seamstress, testified next on behalf of the Employer. (R. Vol. 3, p. 49-49-51). Ms. Thompson stated that she worked right in front of Ms. Mask. She was aware of Ms Mask being fired for bad work quality. Ms. Thompson also stated that Ms. Mask had sewed the chaise lounger many times, but on two or three occasions she would do it wrong. (R. Vol. 3, p. 50).

50). Again, Ms. Thompson stated that there were several times that Ms. Mask had bad quality, especially on chaise loungers.

Ms. Mask testified next. (R. Vol. 3, p. 52-58). Ms. Mask confirmed that she worked from from January of 2007 until September 8, 2008. However, Ms. Mask stated that she was discharged discharged due to lack of work, not poor work quality. (R. Vol. 3, p. 53-54).

Ms. Mask was questioned about the day of the last incident. She stated that she did sew several of the chaise loungers incorrectly, but did not know if she sewed fifty incorrectly. However, she stated that it could have been fifty. (R. Vol. 3, p. 54). Ms. Mask admitted that she sewed the material onto the chair incorrectly, but she stated that it was due to Ms. West giving her the wrong instructions. (R. Vol. 3, p. 54).

Ms. Mask was questioned about other incidents. She stated that she sewed the backs of some love seats wrong about two months prior. She was not sure how many. She again stated that she was wrongly instructed by Ms. West. (R. Vol. 3, p. 55).

Ms. Mask admitted being warned by Ms. West. She and Ms. West would have a discussion about that. She also confirmed that she remembered at least two incidents in which she was given a warning. (R. Vol. 3, p. 56).

On direct examination by her attorney, Ms. Mask stated that she did not think the sewing problems on the chaise loungers were due to her sewing them wrong, but an incorrect pattern. (R.p. 57). Ms. Mask explained that the patterns can look the same; and if the seamstress is not given something to go by, the patterns can easily be "misplaced." (R. Vol. 3, p. 57-58). Ms. Mask stated that she sewed all of the patterns and pieces to the best of her ability. (R. Vol. 3, p. 57-58).

On re-direct examination of Ms. West, she stated that the patterns were cut properly for the the chaise loungers and other chairs. She also stated that Ms. Mask did not report any problems with with the patterns for the chaise loungers or the love seats. (R. Vol. 3, p. 58-59).

The instant case is akin to the misconduct line of cases in which repeated negligent disregard, or willful and wanton, and substantial or serious disregard, of an employee's job duties, and the employer's interest was found to be misconduct. 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 thereby constitutes misconduct. This is so particularly where the employee has demonstrated the ability to do the job, and the employer has warned the employee about errors in, or lack of, satisfactory job performance, thereby giving the employee adequate opportunity to correct the errors, and failure to perform. *See* Shavers v. Miss. Emp. Sec. Comm'n., 763 So.2d 183 (Miss. Ct. App. 2000) (Repeated disregard of job duties after warnings may rise to the level of misconduct.); Kellar v. Miss. Emp. Sec. Comm'n., 756 So.2d 840 (Miss. Ct. App. 2000)(pattern of errors in job performance and refusal to comply with instructions is misconduct); Reeves v. Miss. Emp. Sec. Comm'n., 806 So.2d 1178 (Miss. Ct. App. 2002)(failure to clean up parts after repeated instructions is misconduct); Johnson v. Miss. Emp. Sec. Comm'n., 767 So.2d 1088 (Miss. Ct. App. 2000)(postal workers failure to complete route after being instructed to do so is misconduct); Claiborne v. Miss. Emp. Sec. Comm'n., 872 So. 2d 698 (Miss. Ct. App. 2004)(prolonged and persistent failure to perform routine duties, especially after repeated warnings, constitutes misconduct).

With regard to the cases listed, supra, MDES asks the Court to carefully examine two of them, as the circumstances in the case *sub judice*, most closely follow the legal analysis in the cases

cases of Claiborne and Shavers.

In Shavers, the claimant was employed at a silk screener and was discharged for failure to properly clean the equipment after repeated reprimands. Shavers, 763, So. 2d at (¶2-3). Shavers was reprimanded five times for failure to properly clean equipment. Id. The Claimant also ruined an order of t-shirts, and, on another occasion, an order of caps. Id. at (¶4). The Board of Review found that the claimant was ineligible for benefits and this decision was affirmed by the Hinds County Circuit Court. Id. at (¶5). The Mississippi Court of Appeals affirmed finding that, "Shaver's poor performance was not due to her inability or incapacity to perform her duties as a silk screener." Id. at (¶12). The Court went on to note that:

> Moreover, these were not isolated incidents of ordinary negligence. The record reveals that Shavers was reprimanded at least five times for failing to properly clean the silk screens and the squeegees. Although each incident taken separately may not be enough to support a finding of misconduct, all of these actions considered together evidence "repeated neglect of her employer's interest" and thereby constitute misconduct on the part of Shavers."

Id. at (¶12).

In Claiborne, the claimant received four separate write-ups for failure to properly carry out out her duties. These included failure to properly close and verify the locking of a slot machine door; door; the unexcused failure to respond to a radio call; failure to follow proper protocol in paying out out a jackpot; and over-filling a slot machine hopper. Claiborne, 872 So. 2d at (¶3). The Court held held that, "Claiborne's persistent failure to perform easily accomplished but nevertheless important important duties of her job demonstrated 'carelessness and negligence of such degree, or recurrence recurrence thereof, as to manifest culpability . . . showing an intentional . . . disregard of the employer's interest.'" Id. at (¶2), citing Wheeler, 408 So. 2d at 1383. Furthermore, the Court held: held:

> We have little trouble in finding that prolonged and persistent failure to perform routine duties that the employee is capable of performing properly, especially when that employee is given repeated warnings of those failures but apparently refuses to heed those warnings, may rise to the level of disqualifying misconduct as that term has been defined by statutory enactment and subsequent judicial interpretation.

Id. at (¶6).

Analogously, in this case, Ms. Mask had done the job for many months satisfactorily, had demonstrated the ability, and was warned about sewing patterns onto certain chair or lounger models backwards. Additionally the misdeed, when it occurred, was such that it should have been obvious to Ms. Mask before she sewed fifty chairs incorrectly.

Claimant's attorney makes several arguments as to why Ms. Mask's errors or unsatisfactory job performance should not rise to the level of misconduct under the definition. First, he submits that Ms. Mask never had the ability to do her job. However, Ms. Mask does not take this position in her testimony. She simply states that she was not given the proper instructions. (R. Vol. 3, p. 55, 57). Ms. Mask also obviously did the job properly most days for many months. Further, a co-worker, Ms. Thompson testified and stated that she had sewed the chaise lounge many times properly. (R. Vol. 3, p. 50). Ms. West also stated that the reason her employment was continued until September 8, 2008. in spite of the errors, was because she did the job correctly on many days. (R. Vol. 3, p. 42-43).

Claimant's counsel also argues that Ms. Mask's unsatisfactory job performance should not not constitute misconduct as a matter of law, because there was no evil intent to commit the errors. errors. However, the *Kellar*, *Reeves*, *Johnson* and *Claiborne* cases cited herein above indicate that that an evil intent is not a prerequisite to finding that unsatisfactory job performance may constitute constitute misconduct. Further, as to the final incident, Ms. Mask's errors in sewing the pattern on

on fifty (50) chaise loungers backwards, which caused obvious puckering, appears to be a willful and and wanton disregard for her work. This is particularly so after having made the same errors on the the same chaise lounger a few months earlier, and having been previously instructed on how to sew sew the pattern onto those chaise loungers properly, and made to re-do the chaise loungers. The evidence shows that Ms. Mask was aware that puckering was a sign that she was sewing the pattern pattern incorrectly, the puckering was obvious, and she still continued to sew the pattern improperly improperly on fifty (50) chairs.

As to Claimant's counsel's arguments that the Employer failed to prove a policy violation, the above referenced case authorities, and the misconduct definition found in *Wheeler v. Arriola*, also indicate that proof of a policy violation is not a prerequisite to finding misconduct. All that must be shown is that the employee's behavior meets the definition of misconduct. It is not necessary that the employer have a policy or prove that a policy violation occurred. This is because the definition includes conduct evidencing willful and wanton disregard of the employer's interest or standards of behavior, which the employer has a right to expect from its employees.

Certainly the employer has a right to expect Ms. Mask to continue to do the job properly, when she has demonstrated that she can do the job, and heed warnings not to repeatedly make careless errors. The employer is also entitled to expect Ms. Mask to report to her supervisor if she is she is having trouble sewing patterns on chairs properly before sewing fifty wrong, particularly when when there is obvious puckering, and when she has been warned that something would be done, if if she continued to make the same errors. Moreover, Ms. Mask admitted during the hearing that she she was warned at least twice to correct her sewing errors, which is consistent with the policy

provided by the Employer's payroll department to the initial investigator. (R. Vol. 3, p. 9). Finally, Finally, Ms. West's warning to Ms. Mask that "she needed to do it right or we were going to have to to do something about it" clearly implies that some discipline would be taken, which reasonably could mean discharge, particularly when the errors were serious and recurrent.

Counsel for Claimant also argues that considering the case of Allen v. Miss. Emp. Sec. Comm'n., 639 So. 2d 904 (Miss. 1994), Ms. Mask conduct was not misconduct as a matter of law. However, this case and other similar cases are distinguishable. In Allen v. Miss. Emp. Sec. Comm'n., 639 So. 2d 904 (Miss. 1994), and Foster v. Miss. Emp. Sec. Comm'n., 632 So. 2d 926 (Miss. 1994), the Court held that those persons' failure to perform up to standards were isolated incidents of ordinary negligence, or ineptitude. Here, Ms. Mask demonstrates that she was not inept, and the sheer volume of mis-sewn chairs shows willful and wanton disregard. Moreover, these cases were decided in 1994, and the Court has since handed down decisions distinguishing Allen and Foster from more recent decisions.

Ms. Mask's actions meet the definition of misconduct as found in Wheeler, and this Court should affirm the decision of the lower court in this matter.

## CONCLUSION

In conclusion, the testimony and law substantially supports the Board of Review's decision that Claimant's continued failure perform her sewing duties, and follow the Employer's sewing assignment instructions, after warnings, constitutes misconduct. Thus, applying the standard of review applicable in an appeal of an administrative agency decision, this Honorable Court should accept the Board's decision and affirm the lower court in this matter.

Respectfully submitted, this the 12th day of August, 2011

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

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## CERTIFICATE OF SERVICE

I, LeAnne F. Brady, Attorney for Appellee, Mississippi Department of Employment Security, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to the following:

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Honorable James S. Pound
Circuit Court Judge
Post Office Box 1100
Tupelo, MS 38802-1100

This, the 12th day of August, 2011.

LEANNE F. BRADY