

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUSAN MASK-----APPELLANT

VS.

NO. 2010-CC-01766

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY
TOWNHOUSE HOME FURNISHINGS LLC-----APPELLEES

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

**APPEAL BRIEF OF APPELLANT
SUSAN MASK**

**CARTER DOBBS, JR.
MISSISSIPPI BAR NO. [REDACTED]
103 2ND AVENUE NORTH
POST OFFICE BOX 517
AMORY, MISSISSIPPI 38821**

**TEL: (662) 256-5697
FAX: (662) 256-1483
E-MAIL: carterdobbslaw@gmail.com**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUSAN MASK-----APPELLANT

VS.

NO. 2010-CC-01766

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

TOWNHOUSE HOME FURNISHINGS LLC-----APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications or recusal.

Susan Mask	-	Appellant
Mississippi Department of Employment Security	-	Appellee
Townhouse Home Furnishings, LLC	-	Appellee
Carter Dobbs, Jr.	-	Attorney for Appellant
Leanne F. Brady	-	Attorney for Appellees
Honorable Jim Pounds	-	Trial Judge
Administrative Law Judge	-	Mike Morgan


ATTORNEY FOR THE APPELLANT

CARTER DOBBS, JR.
ATTORNEY FOR THE APPELLANT
MISSISSIPPI BAR NO. [REDACTED]
103 2ND AVENUE NORTH
POST OFFICE BOX 517
AMORY, MISSISSIPPI 38821
TEL: (662) 256-5697
FAX: (662) 256-1483
E-MAIL: carterdobbslaw@gmail.com

TABLE OF CONTENTS

	<u>PAGE</u>
I. APPELLANT'S STATEMENT OF THE ISSUES.....	1
II. STANDARD OF REVIEW.....	1
III. APPELLANT'S STATEMENT OF THE CASE.....	1
(A) NATURE OF THE CASE.....	1
(B) COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.....	1
(C) STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.....	2
IV. SUMMARY OF APPELLANT'S ARGUMENT.....	3
V. APPELLANT'S ARGUMENT.....	4
(a) The definition of "misconduct" on the part of an employee.....	5
(b) Analysis of employer's "evidence".....	5
(c) Arbitrary and capricious nature of the Decisions.....	7
VI. CONCLUSION.....	8

TABLE OF CASES AND STATUTES

PAGE

CASES

<i>Allen v. Mississippi Employment Security Commission</i> , 639 So. 2d 906 (Miss. 1994).....	5
<i>Ferrill v. Miss. Employment Sec. Comm'n</i> , 642 So.2d 933, 936 (Miss.1994).....	7
<i>Mississippi Employment Sec. Com'n v. Johnson</i> , 9 So.3d 1170, 1173 ¶ 9 (Miss.App. 2009).....	1
<i>Wheeler vs. Arriola</i> , 408 So. 2d 1381 (Miss. 1982).....	4, 5, 8

STATUTES

Mississippi Code of 1972, as amended	
§ 71-5-513(A)(1)(b).....	1, 3, 4

I. APPELLANT'S STATEMENT OF THE ISSUES

ISSUE1: THAT THE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT COMMITTED DISQUALIFYING MISCONDUCT PURSUANT TO § 71-5-513(A)(1)(B), MISSISSIPPI CODE OF 1972, AS AMENDED AND THAT SAID FINDINGS WERE NOT BASED UPON SUBSTANTIAL EVIDENCE, AND WERE ARBITRARY AND CAPRICIOUS.

II. STANDARD OF REVIEW

The standard of review by the Court in this cause is whether the determination of the Department of Employment Security in denying Appellant Susan Mask's unemployment benefits was based upon substantial, clear and convincing evidence or was not arbitrary and capricious.

Mississippi Employment Sec. Com'n v. Johnson, 9 So.3d 1170, 1173 ¶ 9 (Miss.App. 2009)

III. APPELLANT'S STATEMENT OF THE CASE

(A) NATURE OF THE CASE.

This appeal involves one single issue, and that issue is whether the determination by Appellee Mississippi Department Of Employment Security and the Circuit Court that Appellant Susan Mask committed disqualifying conduct justifying her discharged were based upon substantial evidence, and were not arbitrary and capricious.

(B) COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Plaintiff/Appellant Susan Mask in this cause will be referred to as "Susan."
Defendant/Appellee Mississippi Department Of Employment Security will be referred to as

“Department.” Defendant/Appellee Townhouse Home Furnishings, LLC will be referred to as “Employer.” Susan’s employment with the employer was terminated. Susan then filed for unemployment benefits. A claims examiner investigated and disqualified Susan for unemployment benefits. Susan appealed this determination, and a hearing was held by Administrative Law Judge Mike Morgan, who affirmed the claims examiner’s decision. Susan appealed the Administrative Law Judge’s decision to the Board of Review, and the Board of Review affirmed the Administrative Law Judge’s decision. Susan appealed the decision of the Board of Review to the Monroe County Circuit Court, and on November 19, 2009 the Circuit Judge entered an Order affirming the decision of the Board of Review denying Susan’s unemployment benefits.

Susan filed a Motion To Alter Or Amend Judgment, Or, In The Alternative, For New Trial, Or, In The Alternative, For Correction Under Rule 60(b). On September 24, 2010 the Circuit Court entered an Order denying Susan’s Motion To Alter Or Amend Judgment, Or, In The Alternative, For New Trial, Or, In The Alternative, For Correction Under Rule 60(b).

It is from these Orders of the Monroe County Circuit Court that Susan has filed her appeal to this Court.

(C) STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

(1) Susan was employed by Appellee Townhouse Home Furnishings, LLC as a sewing machine operator from January 10, 2006, until September 8, 2008, at which time she was discharged (R. 28)(R. E. 7). Susan was discharged by the Employer because of the bad quality of her work. (R. 28; 40-41; 44-45)(R. E. 7; 12-13; 16-17)

(2) After Susan's termination, she filed for unemployment benefits. The claims examiner investigated by interviewing an Employer representative and Susan. The claims examiner disqualified Susan for misconduct connected with her work.

(3) Susan appealed her claim denial, and a hearing was held before the Administrative Law Judge Mike Morgan. The Administrative Law Judge rendered a decision affirming the claims examiner's decision.

(4) Susan appealed to the Board of Review, and the Board of Review affirmed the Administrative Law Judge's decision.

(5) Susan appealed the decision of the Board of Review to the Monroe County Circuit Court, and on October 19, 2009 the Circuit Judge entered an Order affirming the decision of the Board of Review denying Susan's unemployment benefits. (R. 77-78)(R. E. 3-4)

(6) Susan filed a Motion To Alter Or Amend Judgment, Or, In The Alternative, For New Trial, Or, In The Alternative, For Correction Under Rule 60(b). (R. 80-82)

(7) On September 24, 2010 the Circuit Court entered an Order denying Susan's Motion To Alter Or Amend Judgment, Or, In The Alternative, For New Trial, Or, In The Alternative, For Correction Under Rule 60(b). (R. 90)(R. E. 5)

IV. SUMMARY OF APPELLANT'S ARGUMENT

ISSUE1: THAT THE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT COMMITTED DISQUALIFYING MISCONDUCT PURSUANT TO § 71-5-513(A)(1)(B), MISSISSIPPI CODE OF 1972, AS AMENDED AND THAT SAID FINDINGS WERE NOT BASED UPON SUBSTANTIAL EVIDENCE, AND WERE ARBITRARY AND CAPRICIOUS.

Susan was terminated by the employer, allegedly for failure to perform work to the employer's standards. The employer maintained, and the Department affirmed, that Susan's actions constituted "misconduct" as provided by § 71-5-513 (A)(1) (b) of the Mississippi Employment Security Law, and therefore, Susan's application for unemployment benefits was denied. Susan maintains that the facts in this case, and the case law, clearly show that the decisions of the Department and the Circuit Court are not supported by substantial evidence, and were arbitrary and capricious.

V. APPELLANT'S ARGUMENT

ISSUE1: THAT THE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT COMMITTED DISQUALIFYING MISCONDUCT PURSUANT TO § 71-5-513(A)(1)(B), MISSISSIPPI CODE OF 1972, AS AMENDED AND THAT SAID FINDINGS WERE NOT BASED UPON SUBSTANTIAL EVIDENCE, AND WERE ARBITRARY AND CAPRICIOUS.

The seminal case decided by the Mississippi Supreme Court involving the denial of unemployment compensation because of an employer's discharge of an employee for "misconduct" is the case of *Wheeler vs. Arriola*, 408 So. 2d 1381 (Miss. 1982). This case sets out both the standard of review and a detailed discussion of the meaning of the term "misconduct." Susan agrees that if she is in fact guilty of "misconduct" as defined by the Mississippi Employment Security Law, then her unemployment benefits were properly denied. She adamantly disputes this, both factually and as a matter of law.

(a) The definition of “misconduct” on the part of an employee:

Wheeler v. Arriola, in discussing the term “misconduct” states as follows:

The meaning of the term ‘misconduct’, as used in the Unemployment Compensation Statute, was conduct evidencing such wilful and wanton disregard of the employer’s interest as is found in deliberate violations or disregard of the standard 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.

(b) Analysis of employer’s “evidence”:

As set out in *Wheeler v. Arriola*, citing a California case, at page 1383, the conduct of the employee may be harmful to the employer’s interests and justify the employee’s discharge; nevertheless, it evokes the disqualification for unemployment insurance benefits only if it is wilful, wanton or equally culpable. “Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered ‘misconduct’ within the meaning of the statute.”

In the case of *Allen v. Mississippi Employment Security Commission*, 639 So. 2d 906 (Miss. 1994), the employee was discharged for misconduct constituting inefficiency and neglect in his job performance. The Supreme Court found that the employee’s acts could not, as a matter

of law, constitute misconduct because the record lacked evidence of wrongful intent or evil design. There is no evidence in the record in this case of wrongful intent or evil design on Susan's part.

In the case at bar, the employer's primary witness was Susan's sewing supervisor. The supervisor testified that Susan did not ever show the ability to perform her work to the employer's satisfaction. (R. 39)(R. E. 11) After a leading question by the Administrative Law Judge, she changed her answer and said that Susan did have the ability to perform her work satisfactorily. When asked by the ALJ why there was a contradiction in her two answers, she completely failed and refused to answer this question. (R. 40)(R. E. 12)

Of critical importance in this case is the testimony of the sewing supervisor. She testified in response to questions by the ALJ as to why she thought Susan had bad quality problem; that she (the supervisor) did not have an opinion about why Susan had bad quality problems; that perhaps Susan would just forget about how to do the work. (R. 40)(R. E. 12) There was absolutely no testimony at all from the sewing supervisor that Susan had any wilful or evil intent to improperly perform her job. When the sewing supervisor was asked by the ALJ if there were any other factors that were involved in Susan's termination besides quality, she replied "no sir, just bad quality." (R. 41)(R. E. 13)

Townhouse produced one other witness at the hearing, a fellow sewing employee named Donna Thompson. When Ms. Thompson was asked why Susan was terminated from her employment, she replied it was "her quality in her work." Again, there was no testimony by this, or by any other witness, concerning wilful or wrongful intent on Susan's part. (R. 46-47) (R. E. 18-19)

The testimony in this case was that Susan was given several verbal warnings about her poor quality. It is important to note that the company had no set policy about the number of warnings (R. 39)(R. E. 11); the employee handbook makes no statement about quality as a reason for discharge (R. 42)(R. E. 14) and the handbook says nothing about giving warnings before a discharge. (R. 43)(R. E. 15) The sewing supervisor stated that when she gave Susan warnings about her quality, that all she said was that she had bad quality and “she needed to do it right or we were going to have to do something about it.” (R. 43-44)(R. E. 15-16)

The record further shows in this case that the employees were basically on their own in producing products that were sufficient in quality for the employer’s purposes. Specifically, the company had no inspectors to catch errors before they became a serious problem. (R. 29-30) The only warnings given to Susan concerning her quality were verbal, and the company kept no records of warnings. (R. 36-38; 41-42)(R. E. 8-10; 13-14)

(c) Arbitrary and capricious nature of the Decisions:

The only evidence in this case as to any intent on Susan’s part in connection with her bad quality is her own testimony at page 55 of the record that she did not sew intentionally incorrectly. Not only is there is lack of substantial evidence of “wrongful intent or evil design” on Susan’s part justifying her discharge, there is simply *no evidence* in the record of wrongful intent or evil design on her part.


The Employer clearly did not meet its burden of proving Susan’s misconduct by substantial, clear and convincing evidence, as required by *Ferrill v. Miss. Employment Sec. Comm’n*, 642 So. 2d 933, 936 (Miss.1994).

The Administrative Law Judge in this case cited the *Wheeler v. Arriola* case in support of his decision. In fact, the ALJ in so doing turned *Wheeler v. Arriola* on its head. *Wheeler v. Arriola* is factually similar to the case now before this Court, in which "misconduct" by the employee was not found, and unemployment compensation benefits were awarded.

VI. CONCLUSION

There is actually no question in this case as to whether the decision of the Department and the Circuit Court are based upon substantial evidence. The record clearly shows that there was *no evidence* of wrongful intent or evil design on Susan's part justifying her termination. Therefore, the decisions of the Department and Circuit Court in this case should be reversed.

Respectfully submitted,


CARTER DOBBS, JR.
ATTORNEY FOR THE APPELLANT


CARTER DOBBS, JR.
ATTORNEY FOR THE APPELLANT
MISSISSIPPI BAR NO. [REDACTED]
103 2ND AVENUE NORTH
POST OFFICE BOX 517
AMORY, MISSISSIPPI 38821

TEL: (662) 256-5697
FAX: (662) 256-1483
E-MAIL: carterdobbslaw@gmail.com

11.0739.mbw

CERTIFICATE OF SERVICE

I, Carter Dobbs, Jr., attorney for the Appellant, do hereby certify that I have, on this the 10th day of June, 2011, mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appellant's Brief to Honorable Jim S. Pounds, Circuit Court Judge, at his usual mailing address of Post Office Box 316, Booneville, Mississippi 38829, Honorable Leanne F. Brady, attorney for the Appellees, at her usual mailing address of Mississippi Department Of Employment Security, Post Office Box 1699, Jackson, Mississippi 39215 and an original and three copies to Honorable Kathy Gillis, Supreme Court Clerk of Mississippi, at her usual mailing address of Post Office Box 249, Jackson, Mississippi 39205-0249.


CARTER DOBBS, JR.