

IN THE SUPREME COURT OF MISSISSIPPI

DAVE C. TERRY

APPELLANT

VS.

CASE NO. 2010-SA-00980

OFFICE OF THE GOVERNOR
MISSISSIPPI DIVISION OF MEDICAID

APPELLEE

ON APPEAL FROM THE HINDS COUNTY CIRCUIT COURT

BRIEF OF THE APPELLANT
(Oral Argument Not Requested)

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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 Supreme Court justices and/or Court of Appeals judges may evaluate possible conflicts, disqualifications, or recusal:

Dave C. Terry Appellant

Office of the Governor, Division of Medicaid Appellee

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Hon. Roosevelt Daniels, II Hearing Officer

Hon. Tomie T. Green Hinds County Circuit Court Judge

Respectfully submitted, this the 8th day of September, 2010.

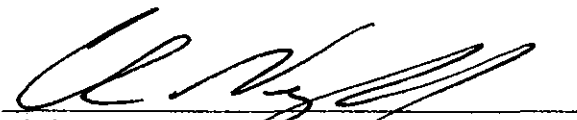

Christopher H. Neyland

TABLE OF CONTENTS

| | <u>Page</u> |
|-----------------------------------|-------------|
| Certificate of Interested Persons | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Statement of the Issues | 1 |
| Statement of the Case and Facts | 2-3 |
| Summary of the Argument | 4 |
| Standard of Review | 5-6 |
| Argument | 6-12 |
| Conclusion | 13-14 |
| Certificate of Service | 15 |

TABLE OF CASES AND AUTHORITIES

| | <u>Page</u> |
|---|-------------|
| <u>Burleson v. Hancock Cty. Sheriff's Dept.,</u> 872 So.2d 43 (Ms. Ct. App. 2003) | 6 |
| <u>Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings,</u> 419 So.2d 211, 213 (Miss. 1982) | 10 |
| <u>Flowers v. Mississippi Dept. of Human Services,</u> 764 So.2d 493 (Ms. Ct. App. 2000) | 7 |
| <u>Harris v. Mississippi Dept. of Corrections,</u> 831 So.2d 1105 (Miss. 2002) | 6, 7 |
| <u>Holloway v. Prassell Enters., Inc.,</u> 348 So.2d 771, 773 (Miss. 1977) | 5 |
| <u>Mathews v. Eldridge,</u> 424 U.S. 319, 335 (1976) | 6 |
| <u>Mississippi Dept. Of Env'tl. Quality v. Weems,</u> 653 So.2d 266, 273 (Miss. 1995) | 5 |
| <u>Mississippi State Dept. of Health v. Hogue,</u> 801 So.2d 794 (Ms. Ct. App. 2001) | 7, 8 |
| <u>Nichols v. City of Jackson,</u> 848 F.Supp. 718, 720 (S.D. Miss. 1994) | 6 |
| <u>Publ. Employees' Ret. Sys. v. Dishmon,</u> 797 So.2d 888, 893 (Miss. 2001) | 5 |
| <u>Publ. Employees' Ret. Sys. v. Marquez,</u> 774 So.2d 421, 425 (Miss. 2000) | 5, 6 |
| <u>Publ. Employees' Ret. Sys. v. Shurden,</u> 822 So.2d 258, 263 (Miss. 2002) | 5 |
| <u>Walters v. Miss. Dep't of Econ. & Cmty. Dev.,</u> 768 So.2d 893, 895 (Miss. 2000) | 5 |

| | |
|---|--------|
| Miss. Code Ann. §25-9-132 (Rev. 2003) | 5 |
| Miss. Code Ann. §21-31-21 (1972) | 6 |
| Miss. Code Ann. §21-31-23 (1972) | 6 |
| Mississippi State Employee Handbook, Procedural Rule 10.7.14. | 8 |
| 42 U.S.C. 2000e-2 | 11, 13 |

STATEMENT OF THE ISSUES

1. **The Appellant was not afforded procedural due process in that his List of Witnesses was struck by the hearing officer as untimely filed, and the Circuit Court judge miscalculated the time in which the Appellant did file his List of Witnesses.**
2. **The evidence presented against Dave C. Terry at the hearing was not supported by substantial evidence**
3. **Terry's termination was in violation of 42 U.S.C. §2000e, et. seq., Title VII of the 1964 Civil Rights Act.**

STATEMENT OF THE CASE AND FACTS

This appeal arises from the Mississippi Employee Appeals Board sustaining the action taken by the Mississippi Division of Medicaid in terminating Dave C. Terry as an employee.

Dave C. Terry ("Terry") was a permanent employee of the State of Mississippi, employed as a Medicaid II Specialist with the Mississippi Division of Medicaid ("DOM"). On August 4, 2004, Terry received a letter from Robert Moody ("Moody"), the then Deputy Director of Administration of Medicaid, in which he was suspended without pay effective August 4, 2004, pending a termination hearing scheduled for August 18, 2004. (Record, page 10). Terry was cited for "Group Three Offense", in this particular instance a conviction for two misdemeanor offenses, stalking and simple assault, in the Rankin County County Court. (Record, page 10).

On August 18, 2004, a termination hearing was held before the DOM's Deputy Director of Executive Service, Nycole Campbell-Lewis ("Ms. Lewis") (Record, page 10). Following the termination hearing, Ms. Lewis submitted a recommendation to Dr. Warren Jones, M.D. ("Dr. Jones"), Executive Director of Medicaid, to terminate Terry's employment. Dr. Jones terminated Terry's employment by letter on August 31, 2004. (Record, page 10). Terry timely filed a Notice of Appeal with the Mississippi Employee Appeals Board (the "EAB") on September 13, 2004. (Record, page 10). On October 15, 2004, a Notice of Hearing was filed, scheduling an appeal hearing for November 23, 2004. (Record, page 10). On November 22, 2004, Terry, through counsel, requested a continuance, which was granted by the hearing officer, Hon. Roosevelt Daniels, via Order on November 30, 2004. (Record, page 10). The appeal hearing was rescheduled for March 17, 2005. On March 16, 2005, Terry, through counsel, again requested a continuance, which was again granted. (Record, page 10).

Following the last request for continuance, Terry substituted counsel. The appeal hearing was rescheduled for May 12, 2005. (Record, page 10). On May 2, 2005, Terry, through counsel, filed his Petitioner's List of Witnesses, Request for Issuance of Subpoenas *ad testificandum* and Request for Issuance of Subpoenas *duces tecum*. (Record, page 10). On May 5, 2005, DOM filed its Motion to Strike Terry's List of Witnesses as untimely filed. (Record, page 11). On May 10, 2005, a telephonic hearing was held upon DOM's Motion to Strike. (Record, page 10 and Vol 2 of 3). The Hearing Officer, Hon. Roosevelt Daniels, granted DOM's motion and struck as untimely filed Terry's List of Witnesses and Requests for Subpoenas. Judge Daniels did not strike the subpoena *duces tecum* pertaining to Terry's personnel file. (Record, page 11).

On May 12, 2005, the appeal hearing was held. At the appeal hearing, the Hearing Officer struck DOM's Witness List as untimely filed, but allowed one of the witnesses on said list to testify. (Record, page 11). On May 20, 2005, the Hearing Officer filed his Opinion and Order, denying Terry's appeal and allowing the termination to stand. (Record, page 11). On May 26, 2005, Terry filed a Request for Review by Full Board. (Record, page 11). On October 12, 2005, the Mississippi Employee Appeals Board issued an Order affirming the action taken by the hearing officer. Terry filed both his Notice of Appeal of that decision and his Designation of the Record with the Hinds County Circuit Court on November 3, 2005. (Record, pages 2-5).

The Hinds County Circuit Court judge, the Honorable Tomie T. Green, issued a Memorandum Opinion and Order on September 8, 2008, denying the appeal and affirming the decision of the Mississippi Employee Appeals Board. This appeal was timely filed from that decision on October 7, 2008.

SUMMARY OF THE ARGUMENT

Dave C. Terry was not afforded procedural due process in his hearing before the Honorable Roosevelt Daniels, II, in that he was not allowed to call witnesses on his behalf due to the striking of his List of Witnesses as being untimely filed. There is nothing in the Mississippi State Employee Handbook which requires a List of Witnesses to be offered prior to an originally scheduled hearing, as opposed to a rescheduled hearing. The Division of Medicaid was allowed to call a witness from its List of Witnesses, even though its own List of Witnesses was deemed to be untimely filed. The decision to strike Terry's List of Witnesses was arbitrary, capricious, and completely denied him the opportunity to adequately present his case at the hearing. As such, this cause should be remanded back to the hearing officer and Terry should be allowed to call the witnesses from his List of Witnesses in his defense.

The evidence presented against Dave C. Terry at the hearing was not supported by substantial evidence. The introduction of a crime or crimes which had been expunged from his record prior to the hearing before Judge Daniels was violative of state law, and did not present substantial evidence meriting the termination of his employment. As such, the decision to terminate Terry was arbitrary and capricious, and should be overturned.

Dave Terry was terminated from his employment with the Division of Medicaid because he was a man working in an office primarily staffed with women. The use of Terry's sex as a factor in his termination violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000, which prohibits the use of sex or gender in terminating an employee.

ARGUMENT

STANDARD OF REVIEW

The standard of review governing an appeal from a decision of an administrative agency is that of substantial evidence. Walters v. Miss. Dep't of Econ. & Cmty. Dev., 768 So.2d 893, 895 (Miss. 2000) (citing Holloway v. Prassell Enters., Inc., 348 So.2d 771, 773 (Miss. 1977)). Pursuant to Miss. Code Ann. § 25-9-132 (Rev. 2003), the statutory scope of judicial review of an employee appeals board decision is:

- (2) The scope of review of the circuit court in such cases shall be limited to review of the record made before the employee appeals board or hearing officer to determine if the action of the employee appeals board is unlawful for the reason that it was:
 - (a) Not supported by substantial evidence;
 - (b) Arbitrary or capricious; or
 - (c) In violation of some statutory or constitutional right of the employee.

These factors which govern the standard of review for agency decisions are the only grounds for overturning an agency's action; otherwise the agency's determination must remain undisturbed. Walters, 768 So.2d at 897; Miss. Dep't of Env'tl. Quality v. Weems, 653 So.2d 266, 273 (Miss. 1995). "A rebuttable presumption exists in favor of the action of the agency, and the burden of proof is on the party challenging an agency's action." Publ. Employees' Ret. Sys. v. Shurden, 822 So.2d 258, 263 (Miss. 2002); Pub. Employees' Ret. Sys. v. Dishmon, 797 So.2d 888, 893 (Miss. 2001). If an administrative agency's decision is not based on substantial evidence, this Court will find the decision to be arbitrary and capricious. Pub. Employees' Ret.

Sys. v. Marquez, 774 So.2d 421, 425 (Miss. 2000).

1. **Terry was not afforded procedural due process in that his List of Witnesses was struck by the hearing officer as untimely filed, and the Circuit Court judge miscalculated the time in which the Appellant did file his List of Witnesses.**

The Fourteenth Amendment forbids states from depriving an individual of life, liberty or property without due process. Due process requirements are not the same in every situation. Rather, the amount of process required varies according to the circumstances of the deprivation. In Mathews v Eldridge, 424 U.S. 319, 335 (1976), the three factors normally weighed in determining the required due process are the importance of the individual interests involved, the value of the specific procedural safeguards to that interest and the government interest in administrative efficiency. Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

When a procedural due process claim is raised in a case, it must be evaluated using a two step process. Nichols v. City of Jackson, 848 F. Supp. 718, 720 (S.D. Miss.1994). "The first step requires the court to decide whether a protected life, liberty or property interest exists. The second step is a court determination of what process is required in the situation." *Id.*

The first step of the analysis is easily dealt with. A civil service employee, such as Terry, has a property interest in his employment, created by Mississippi Code Annotated Sections 21-31-21 and 21-31-23, which provide that civil service employees cannot be discharged except for cause. Burleson v. Hancock Cty. Sheriff's Dept., 872 So.2d 43, (Ms. Ct. App. 2003).

The second step of the due process evaluation is what process is required in the situation. In Harris v. Mississippi Dept. of Corrections, 831 So.2d 1105 (Miss. 2002), the Mississippi

Supreme Court held that even if the Mississippi Department of Corrections did not follow proper procedures in reviewing an employee's grievance, a full de novo hearing before a hearing officer of the Employee Appeals Board cured any deficiency, where the hearing officer allowed the employee to "put forth his own witnesses, cross-examine any witnesses put forth by MDOC, and to make his arguments before a judge." Harris v. Mississippi Dept. of Corrections, 831 So.2d 1105 (Miss. 2002).

As Terry was not allowed to put forth his own witnesses, he was not afforded procedural due process and the decision of the hearing officer, upheld by the Mississippi Employee Appeals Board and Circuit Court was in error.

In Flowers v. Mississippi Dept. Of Human Services, 764 So.2d 493 (Ms. Ct. App. 2000), the Mississippi Court of Appeals held that the aggrieved employee in that case was afforded due process in that she was given pre-termination written notice, with opportunity to attend a pre-termination conference and to bring with her any witnesses she felt would be helpful. Flowers v. Mississippi Dept. Of Human Services, 764 So.2d 493 (Ms. Ct. App. 2000).

Due process, therefore, must come before the hearing officer of the Employee Appeals Board, to the extent that due process would require an aggrieved employee the opportunity to call witnesses on his behalf. See, e.g., Mississippi State Dept. of Health v. Hogue, 801 So.2d 794 (Ms. Ct. App. 2001). In Hogue, the Mississippi Court of Appeals held as follows:

Hogue's due process rights in this procedure were not protected by the guarantee of a full-scale evidentiary proceeding prior to any disciplinary action. Rather, her right to due process, upon becoming dissatisfied with the disciplinary proceedings conducted by her employing agency, was to appeal the unfavorable decision to the Employee Appeals Board. It is there that Hogue was guaranteed a de novo proceeding, at which she would be "afforded

all applicable safeguards of procedural due process" that specifically included the right to representation by counsel, **the right to compel the presence of witnesses, and the right to have those witnesses' testimony taken under oath.** Miss.Code Ann. § 25-9-131 (Rev. 1999).

Mississippi State Dept. of Health v. Hogue, 801 So.2d 794 (Ms. Ct. App. 2001) (my emphasis).

As has been established and as all parties herein agree, Terry's List of Witnesses was struck by Judge Daniels, and as such, Terry was not allowed to offer any witnesses on his behalf.

The relevant portion of the Mississippi State Employee Handbook states that:

Each party, no later than ten (10) calendar days prior to **the** hearing date, shall file with the Employee Appeals Board a list of witnesses such party will call to testify at the hearing.

Mississippi State Employee Handbook, Procedural Rule 10.7.14.

There is nothing in the Mississippi State Employee Handbook which requires the witness list be filed ten days prior to the original hearing date. Any such rule would prejudice any aggrieved state employee who, for example, substituted counsel prior to the original hearing, requested a continuance, and then wanted to change strategy at the hearing, to include a list of witnesses, or additions to a list of witnesses.

Judge Daniels stated in his ruling granting the Motion to Strike Terry's List of Witnesses that it was the "practice" of the Employee Appeals Board to strike any witness list that was not filed ten days prior to the original hearing date. (Record, Volume 2, Transcript pages 24-25). There is no basis for this opinion or ruling. There is no published rule in the Mississippi State Employee Handbook requiring a witness list to be provided 10 days prior to an original hearing date, and there is no published rule stating that a witness list cannot be provided 10 days prior to any re-scheduled hearing. It simply does not exist.

The decision to exclude Terry's List of Witnesses, which was timely filed as it relates to the May 12, 2005 hearing before Judge Daniels, was arbitrary and capricious, without any foundation in the rules governing appeals to the Employee Appeals Board, and as such deprived Dave C. Terry of his procedural due process rights. Further, Judge Green, in her Memorandum Opinion and Order, ruled that Terry has filed his witness list nine days prior to the May 12, 2005 hearing. (Record, page 14). However, the witness list was filed on May 2, 2005 (Record, page 10). Excluding the date it was filed, the witness list was filed 10 days prior to the May 12, 2005 hearing, not 9 days, as calculated by the Circuit Court judge.

As such, the Circuit Court judge erred in both calculating the time frame in which Terry's witness list was filed, as well as in following the hearing officer's decision to exclude the witness list based on an unpublished rule or "practice".

2. The evidence presented against Dave C. Terry at the hearing was not supported by substantial evidence

At the hearing, the only testimony that was allowed was that of Rachel Shinard, the agency representative of the Division of Medicaid. Ms. Shinard testified that Terry was terminated due to his Group III violation, i.e, the criminal conviction for a felony or misdemeanor while employed. However, she further testified that the reason Terry was terminated, when other alternatives existed, was because of "other offenses" in his personnel file. (Record, Volume 3 of 3, Transcript pages 13 and 14). However, nothing from Terry's personnel file was introduced into evidence at the hearing. Nothing regarding previous offenses was introduced into evidence at the hearing. In fact, Ms. Shinard testified at the hearing that she did not know why Terry was not suspended or demoted, stating when asked, "I don't know. You

would have to get that from the hearing officer and the Executive Director.” (Record, Volume 3 of 3, pages 32-33).

Of course, the Executive Director was on Terry’s Witness List, but Terry was not allowed to call him as a witness. Ms. Shinard did testify that the Division of Medicaid is supposed to impose discipline and increasing steps of severity when practical. (Record, Volume 3 of 3, pages 32-33)

Substantial evidence is such that would make any conclusion based on that evidence a reasonable one. Since the amount may be less than a preponderance, there might be substantial evidence to support one fact-finder's view, and the same record may provide substantial evidence to support the opposite view. Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings, 419 So.2d 211, 213 (Miss. 1982).

The evidence presented at the hearing came not from any of the individuals who decided to terminate the employment of Dave C. Terry, but from the person who typed the letter for the person who decided to terminate the employment of Terry. (Record, Volume 3, Transcript page 36-38). The testimony provided by Ms. Shinard falls well short of even a scintilla of “evidence” as to the reasons Terry was terminated by the Division of Medicaid. She cites “other offenses”, but not what those offenses were, which denied Terry the ability to effectively cross-examine her on those issues. She testified that she had no idea why Terry was terminated as opposed to being handed a lesser punishment like suspension or demotion, even though, per her admission, the Division of Medicaid is supposed to utilize increasing steps of severity when disciplining an employee.

As such, the evidence presented against Terry was insufficient to justify his termination,

and as such, his termination was arbitrary and capricious.

3. Terry's termination was in violation of 42 U.S.C. §2000e, et. seq., Title VII of the 1964 Civil Rights Act.

42 U.S.C. 2000e-2, reads, in relevant part, as follows:

(a) Employer practices

1. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2

Ms. Shinard testified during the hearing as follows:

Q. As a Medicaid Specialist did he (Terry) work with the public?

A. Yes. He worked directly with the Medicaid recipient and they are considered the public. He also worked in an office full of women.

(Record, Volume 3 of 3, Transcript page 15).

It is clear that Terry, as a male employee, was terminated, at least in part, due to the fact that he worked in an "office full of women". There is no reason for Ms. Shinard to volunteer this information unless it was a consideration in Terry's termination. As such, his termination violates a statutory right, i.e., the right not to be terminated or discharged because of one's sex, as

codified in 42 U.S.C. 2000e-2. The violation of a statutory right is sufficient to overturn the decision of the Mississippi Employee Appeals Board.

CONCLUSION

Dave C. Terry was not afforded procedural due process. He was never allowed to call witnesses on his behalf. These witnesses were expected to testify as to how other similarly situated employees were treated by the Mississippi Division of Medicaid. These witnesses were expected to testify as to his job performance while employed at the Mississippi Division of Medicaid. These witnesses were expected to testify as to his general character. As the only witness who testified against Mr. Terry mentioned that he worked in an office full of women, it is possible that Mr. Terry's witnesses could have shed some light on why that fact was relevant to the Division of Medicaid in its decision to terminate Mr. Terry.

But as he was not allowed to present any witnesses, none of this expected testimony was ever presented on his behalf. And these witnesses were excluded because of a "practice" of the Mississippi Employee Appeals board, a "practice" which is not a published rule in the Mississippi State Employee Handbook and, in fact, does not exist. The Hinds County Circuit Court judge, the Honorable Tomie T. Green, miscalculated the number of days in which Terry did file his list of witnesses, stating in her Memorandum Opinion and Order that Terry filed his list of witnesses 9 days prior to the May 12, 2005 hearing, when in fact Terry filed his witness list 10 days prior to the May 12, 2005 hearing.

As Mr. Terry was not allowed to call witnesses on his behalf, he was denied due process and the ability to effectively defend himself before the Employee Appeals Board.

The evidence offered against Terry came not from a decision maker, but from the person who typed the letter for the decision maker. She testified to matters that were outside the scope of Terry's termination, and she admitted that she had no idea why alternative disciplinary actions

were not taken, adding that one would have to ask the Executive Director about that issue. The Executive Director was on Terry's witness list, but Terry was not allowed to call him as a witness.

The Division of Medicaid employee who was allowed to testify volunteered during her testimony that Terry worked in an office full of women. As such, Terry's gender was a factor in his termination, and using his gender as a factor in his termination violated his statutory rights.

CERTIFICATE OF SERVICE

I, Christopher H. Neyland, one of the attorneys for the appellant, certify that I have this day mailed, via U.S. mail, postage pre-paid, a true and correct copy of the Brief of the Appellant to the following:

Hon. Tomie T. Green
Hinds County Circuit Court Judge
P.O. Box 327
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This the 8th day of September, 2010.


Christopher H. Neyland