IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2011-CC-00595

SKYHAWKE TECHNOLOGIES, LLC — APPELLANT

V.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
AND SHAWN GILLIS — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, SKYHAWKE TECHNOLOGIES, LLC

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

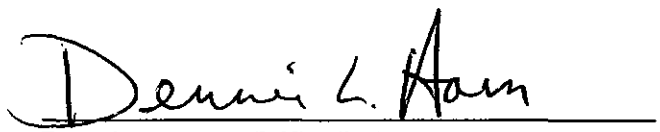
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. SkyHawke Technologies, LLC, Appellant, the employer, is a producer of a GPS mapping device for golf courses.
2. Shawn Gillis, Appellee, is the employee terminated for sexual harassment.
3. Libby Comeaux is Administrative Law Judge for the Mississippi Department of Employment Security.
4. Horn & Payne, PLLC, Dennis L. Horn and Shirley Payne, attorneys for SkyHawke Technologies, LLC, Appellant.
5. Hon. Paul E. Rogers, attorney for Shawn Gillis, Appellee.
6. Hon. LeAnne F. Brady, Senior Attorney for Mississippi Department of Employment Security, Appellee.
7. Les Range, Executive Director, MDES Legal Department, Mississippi Department of Employment Security, Appellee.

8. Members of the Board of Review for the Mississippi Department of Employment Security, Appellee.

9. Hon. William E. Chapman III, Madison County, Mississippi, Circuit Judge.

Respectfully submitted,



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STATEMENT REGARDING ORAL ARGUMENT

The employer-appellant requests oral argument to clarify that the denial of admissible, substantial evidence and the application of the incorrect standard of law renders the administrative decision arbitrary and capricious and error as a matter of law..

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2011-CC-00595

SKYHAWKE TECHNOLOGIES, LLC — APPELLANT

V.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
AND SHAWN GILLIS — APPELLEES

STATEMENT OF THE ISSUES

1. Whether a claimant fired for sexual harassment is guilty of misconduct disqualifying him from unemployment compensation?

2. Whether the circuit court erred as a matter of law by failing to find sufficient evidence to disqualify the claimant while requiring, instead, that the employer prove fraud?

3. Whether it was error of law for the Administrative Law Judge to exclude consideration of the Employee Handbook on sexual harassment?

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2011-CC-00595

SKYHAWKE TECHNOLOGIES, LLC — APPELLANT

V.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND SHAWN GILLIS — APPELLEES

BRIEF OF APPELLANT, SKYHAWKE TECHNOLOGIES, LLC

STATEMENT OF THE CASE

NATURE OF THE CASE

This case is an appeal from an order on unemployment compensation made pursuant to § 71-5-513, and § 71-5-531, Miss. Code Ann. (Repealed effective July 1, 2011), reenacted without change, Laws, 2011, ch. 471, § 46, effective from and after July 1, 2011.

COURSE OF PROCEEDINGS AND DECISION IN THE COURT BELOW

Claimant was initially disqualified for benefits based on misconduct, sexual harassment. R. Vol. 2, pp. 11 and 13. The Administrative Law Judge overturned that decision. RE 9-11. The Board of Review affirmed without opinion on November 24, 2010. RE 12, R. Vol. 2, p. 163. The appeal to Circuit Court was timely filed on December 3, 2010. R. Vol. 2, pp. 166-169. The Circuit Court affirmed the decision of the Board of Review with a one paragraph Opinion

and Order, stating that "The Court having reviewed the entire record does not find any evidence of fraud...". RE 13, R. Vol. 1, p. 116. This appeal timely followed. R. Vol. 1, p. 126.

FACTS

The Claimant himself admitted he was fired for sending inappropriate text messages of a sexual nature to a female employee.

When the employee, Shawn Gillis, first applied for unemployment, his statement to the agency was that he:

> was discharged for sending inappropriate text messgs. of a sexual nature to a female employee. The employee reported clmt to HR, and they did see the messgs; Clmt also admitted to sending the messages to the co-worker. Clmt was discharged for sexual harassment.

R. Vol. 2, p. 9. These were the claimant's own admissions, including his admission that he was discharged for sending an inappropriate text message to a female employee. *Id.* Based on these admissions, the claims examiner for the Mississippi Department of Employment Security determined that Mr. Gillis was discharged for sending sexually explicit messages to a coworker through his cell phone. R. Vol. 2, p. 11.

Shawn Gillis left voice messages to his female co-worker saying: "F--- you. Thank you." Vol. 2, p. 135. The claimant admitted that the term was offensive and stated that he intended to anger the female employee. R. Vol. 2, p. 118. Other messages from the claimant included, "Bye-bye, bitch." R. Vol. 2, p. 134. "Well, shit. I tried to get - - oh well. Peace, love, sex; maybe not." *(Id.)* "You are such a bitch. Anyway, bye-bye." *(Id.)* Shawn Gillis had also accosted the female employee by shoving his cell phone in her face while standing in the doorway to her work cubicle. R. Vol. 2, p. 75. He interfered with her work and made her very uncomfortable. *(Id.)* "It was very uncomfortable to come to work in an environment where you didn't know whether

the person was acting very irrational, what they were gonna to do to you next." R. Vol. 2, p. 82. Shawn Gillis had come to her home, uninvited. R. Vol 2, p. 76. The female employee testified that Gillis scared her. R. Vol. 2, p. 75.

The emails Mr. Gillis had written had text messages that read: "Mr. Asshole here..." R. Vol. 2, p. 138, "Tommorow wil be he'll" (*Id.*), " (sic) 'Game On' perra Dearest Punta" (*Id.*). "Punta" is a Spanish word that translates as "bitch," with the connotations of a slut or whore and is considered a sexually offensive term. R. Vol. 2, p. 120.

The senior staff at SkyHawke reviewed the claimant's emails and the reports from the female employee and grew alarmed. They called the police to escort claimant Shawn Gillis out of the office when they fired him. R.Vol. 2, p. 137. The company's internal memo stated, "...the situation with Shawn Gillis and [the co-worker] continues to escalate to the point that we must act now. Having discussed the matter with Rich, Dale and Connie (and Dennis), we are going forward with terminating Shawn today. We have placed a call to the Ridgeland PD to have an officer here, and will advise [the co-worker] on how to get a restraining order from Ridgeland...." (*Id.*)

The claimant had been given the employee handbook which made sexual harassment a terminable offense. Claimant had signed to acknowledge receipt (R. Vol. 2, p. 141) and understanding of the handbook (R. Vol. 2, p. 144) and testified he understood the sexual harassment policy (R. Vol. 2, p. 117).

SUMMARY OF THE ARGUMENT

This is an appeal brought by an employer, SkyHawke Technologies, LLC, contesting an award of unemployment benefits to an employee, Shawn Gillis, fired for sexual harassment. The

ruling of the Mississippi Department of Employment Security, affirmed below, puts the employer in an untenable position. Under state and federal law, the employer must protect its female employee from harassment, while under the present ruling it is being held liable for the termination of the harassing male. The circuit court erred as a matter of law by requiring a finding of fraud to support disqualifying the claimant from unemployment benefits. The Administrative Law Judge erred as a matter of law in excluding the employee handbook, and its sexual harassment policy, from evidence. SkyHawke seeks reversal of the unemployment ruling in order to hold that the claimant who engaged in sexual harassment is not entitled to unemployment benefits.

ARGUMENT

I. The Circuit Court erred as a matter of law by requiring a finding of fraud and failing to find that substantial evidence supports the employer, not the claimant.

The Circuit Court's opinion and order are perfunctory at best. The opinion appears to be an off-the-shelf decision, issued without any real consideration of the record. Not a single fact is quoted. The opinion cites no law. Although the circuit court recited that "The court having reviewed the entire record does not find any evidence of fraud...." RE 13, R. Vol. 1, p. 116, fraud was never an issue in this case. Substantial evidence is the test. The correct standard of review is whether substantial evidence supports the decision or whether the Mississippi Department of Employment Security (MDES) was arbitrary and capricious. *Brown v. MDES,* 29 So.3d 760, 769 (Miss. 2000); *Walker Mfg. Co. v. Cartrell*, 577 So.2d 1243, 1247 (Miss. 1991). This case must be reversed for applying the incorrect standard of law.

In *Johnson v. MESC and Heritage Manor*, 761 So.2d 861 (Miss. 2000) the Mississippi Supreme Court found misconduct justifying disqualification from unemployment benefits based

solely on remarks from the claimant that were found threatening. In *Johnson* there had been no actions accompanying the threat, and nobody felt they had to call the police, but the verbal threat alone was sufficient to cause termination. The Court held, "The threat which was made is certainly contrary to the employer's interest in securing a safe and caring environment....Such a threat goes beyond inadvertency or ordinary negligence and was in substantial disregard of the employer's interests and of the employee's duties." *Id.*, at 866-867. In the instant case, the threat from Shawn Gillis, his ongoing sexual harassment, was enough to interfere with work, to make the female employee scared of him, and to cause his employer to call the police. Based on the existing precedent, it is an error of law for the circuit court to permit the claimant to draw unemployment benefits.

II. Shawn Gillis admitted under oath he knew the SkyHawke Employee Handbook clearly prohibited sexual harassment, including foul language.

The employer had rules that prohibited sexual harassment and offensive language. The company's established, printed, sexual harassment policy appears in the record as R. Vol. 1, pp. 67-70; R. Vol. 2, pp. 145-149 (The SkyHawke Technologies, LLC, Employee Handbook). The handbook provides: "Harassment SkyHawke Technologies is committed to providing a pleasant work place, free from discrimination and harassment. In that regard, the Company strictly prohibits harassment of any kind, including, but not limited to, discrimination based on ...sex.... To fulfill this commitment, we each have certain responsibilities. All employees are expected to behave in a professional manner. This includes refraining from the abuse of abusive or foul language, verbal, physical, or sexual harassment directed to any employee... or any other behavior that is inappropriate for the work place." R. Vol. 2, pp. 147, 149. The handbook further provides that "Any employee found guilty of any discriminatory practices is subject to

immediate disciplinary action, including termination of employment, and could also be subject to legal action." R. Vol. 2, p. 147. The claimant Shawn Gillis testified that "I felt that I understood what the sexual harassment policy was." R. Vol. 2, p. 117.

The claimant Shawn Gillis had acknowledged his agreement to abide by the company's sexual harassment policy. R. Vol. 2, p. 144. The Mississippi Supreme Court and Court of Appeals have consistently relied on the MESC[1] Administrative Manual, Part V, Paragraph 1720, which states that an employee shall be found guilty of misconduct for violation of a rule where: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced. *E.g., Southwood Door Co.*, 847 So.2d 833 (Miss. 2003), *Johnson v. MESC and Heritage Manor, supra*, at 866, P17. SkyHawke meets all three of these criteria. Shawn Gillis knew of the rule, the rule was reasonably related to job expectations, and there is no showing of anything other than fair and consistent enforcement.

III. The Administrative Law Judge erred in ruling portions of the Employee Handbook inadmissible.

The Administrative Law Judge (ALJ) treated this case as discipline for vulgar language, where it was, clearly, a termination for sexual harassment.

The ALJ ruled that the full statement of the company's sexual harassment policy, from the Employee Handbook, would not be admitted into evidence. That ruling was erroneously based on a finding that the Handbook had not been submitted as an exhibit. To the contrary, SkyHawke had submitted that exhibit by mail more than two (2) weeks before the hearing

[1] MESC, the Mississippi Employment Security Commission, is the predecessor agency to the Mississippi Department of Employment Security.

(August 26, 2010 mailed, September 9, 2010, hearing). R. Vol. 1, p. 77. SkyHawke additionally faxed the sexual harassment policy to the ALJ during the hearing itself. R. Vol. 1, p. 82.

There is clear precedent allowing an employee handbook into evidence. *MDES v. Clark,* 13 So.3d 866 (Miss. Ct. App. 2009). In *Clark,* the Court ruled that the employer had an established policy in the employee handbook, that the employee had signed a form stating that he had received the employer's company handbook, and that the handbook was substantial evidence supporting the decision that the employee's behavior qualified as misconduct. *Clark,* at 873, P16. Here, SkyHawke had an established sexual harassment policy. Shawn Gillis signed a form stating he had received the company handbook. The SkyHawke handbook is substantial evidence.

Evidence in administrative hearings is broadly admissible. The MDES hearings are not limited to strict rules of evidence. Even hearsay is allowed. There was no basis for excluding the employee handbook as evidence. Unemployment Insurance Regulations, the Mississippi Department of Employment Security 200.04(D), *Sun Vista, Inc. v. MDES,* 52 So.3d 1262, 1269, P22 (Miss. Ct. App. 2011); *Davis v. Public Employee Ret. Sys.* 750 So.2d 1225, 1231 (Miss. 1998); *McClinton v. MDES,* 949 So.2d 805, 808 P6 (Miss. Ct. App. 2006). The SkyHawke handbook is a reliable article of proof which should have been admitted into evidence. A fair hearing requires that each party is allowed to introduce its own evidence. *Johnson v. MESC, supra,* 867, P25 (Miss. 2000).

IV. The situation had escalated until management called the police, justifying Gillis' termination.

The findings of the ALJ's opinion establish that Shawn Gillis was not acting in his own best interest, much less in the best interest of his employer. The Administrative Law Judge ruled

that the claimaint's behavior was erratic, that he was distraught from his recent divorce, and that he was not acting in his right mind. RE 9-10, R. Vol. 1, pp. 152-153. These findings are even more significant when taken in context with a work situation where the management staff felt it necessary to call the police to escort Mr. Gillis out of the work place. These are reasons justifying his termination.

V. Sexually offensive remarks disqualify a claimant on the basis of misconduct.

The controlling Mississippi statute provides that, "Disqualifications A. An individual shall be disqualified for benefits: ...(b) For the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work, if so found by the department..." Miss. Code Ann. § 71-5-513. This Court has advised the lower courts to disqualify claimants for "misconduct," defined in the unemployment compensation statute, as "conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee."[2] Misconduct is also defined as "conduct that reasonable and fairminded external observers would consider a wanton disregard of the employer's legitimate

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[2] This definition has been applied by the Mississippi Supreme Court and the Court of Appeals since 1982 in cases finding sufficient evidence of misconduct. *See* ***Halbert v. City of Columbus***, 722 So. 2d 522 (Miss. 1998) (holding that employee's failure to submit to random drug test within required three-hour time frame of being notified constituted misconduct). *See also* ***Young v. Miss. Employment Sec. Comm'n***, 754 So. 2d 464 (Miss. 1999) (affirming denial of benefits and finding that employee's failure to relinquish identification [**18] badge upon suspension constituted misconduct); ***Reeves v. Miss. Employment Sec. Comm'n***, 806 So. 2d 1178 (Miss. Ct. App. 2002) (affirming denial of benefits to employee terminated for failing to clean parts as instructed); and ***Captain v. Miss. Employment Sec. Comm'n***, 817 So. 2d 634 (Miss. Ct. App. 2002) (discussed *infra)*(affirming denial of unemployment compensation to employee terminated for violating company e-mail policy, on a parallel to the instant case).

interests." *Henry v. MDES*, 962 So.2d 94, 101, P19 (Miss. Ct. App. 2007); *Wheeler v. Arriola,* 408 So.2d 1381, 1383 (Miss. 1982). Further, behavior that is careless and negligent to such degree, or recurrence thereof, as to manifest culpability, wrongful intent, or evil design, can be classified as misconduct. *Nevels v. Miss. Dept. Employment Sec.*, 39 So.2d 995, 997-998, P11 (Miss. Ct. App. 2010). The Mississippi Supreme Court has repeatedly held that "the meaning of the term 'misconduct,' as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregards of standards of behavior which the employer has the right to expect from his employee." *Southwood Door Co. v. Burton*, 847 So.2d 833, 840, P26 (Miss. 2003). The behavior of claimant Shawn Gillis clearly meets this definition of "misconduct."

Generally, sexually suggestive remarks over electronic media support denial of unemployment benefits. *Fugate v. State Department of Industrial Relations*, 612 So.2d 226 (Ala. 1992). The Mississippi Supreme Court has upheld a denial of unemployment benefits based on statements made by an employee whether or not that employee was at the workplace, *Johnson v. Mississippi Emp. Sec. Comm'n*, 761 So.2d 861, 867 (Miss. 2000), and the Court of Appeals has similarly upheld a denial of unemployment benefits based on disruptive emails sent by a male employee to female employees. *Captain v. Mississippi Emp. Sec. Comm'n*, 817 So.2d 634 (Miss. Ct. App. 2002); and see *Gay v. Administrator*, 2007 Conn. Super. LEXIS 2547 (Conn. 2007)(court overturned ALJ and Board finding to hold company had discharged the plaintiff for wilful misconduct in that his conduct created a hostile work environment when he verbally attacked a female employee); *Kelly v. Pate*, 668 So.2d 32 (Ala. 1995)(no unemployment benefits for employee fired for sexual harassment).

Mr. Gillis was not acting in his employer's best interest. His behavior easily meets the test that it "was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregards of standards of behavior which the employer has the right to expect from his employee." *Southwood Door Co. v. Burton, supra.*

The findings of the Administrative Law Judge would, in and of themselves, support a ruling for the SkyHawke that the employee, Shawn Gillis, was fired for misconduct. The opinion sets out as a fact that the female employee was uncomfortable around Shawn Gillis, RE 10, R. Vol. 1, p. 152. The female employee had testified that she was afraid of Gillis. R. Vol. 2, pp. 80-82. The ALJ found as a fact that Gillis had accosted the female employee at work (RE 10, Vol. 1, p. 152), that he had used offensive language in emails to her (*Id.*), that he said "Game on," when she refused to respond to his emails (*Id.*). The ALJ's opinion further found that the emails were, in fact, offensive (*Id.*) and that Gillis had been acting irrationally and "was not in his right mind." (*Id.*).

VI. The Claimant is not entitled to an insanity defense.

The ALJ seemed to rule that Gillis was not in his right mind and was therefore excused from any standard of conduct. If that is the point the ALJ is trying to make, it is not one that is established in the law nor proved on this record. Even an employee who is found to be mentally disabled is held to the same standard of conduct as his non-disabled co-workers. See, EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities, Notice No. 915.002, 8 Fair Employment Prac. Manual (BNA) 405:7463 (1977); *Palmer v. Circuit Court,* 117 F.3d 351, 352 (7th Cir. 1997). As the Fifth Circuit has summarized it, "the ADA does not insulate emotional or violent outbursts blamed on an impairment. An employee who is fired

because of outbursts at work directed at fellow employees has no ADA claim." *Hamilton v. Southwestern Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998).

Here, Shawn Gillis was clearly on notice that sexual harassment would not be tolerated. He had accepted that condition of his employment when he signed off on the employee handbook. Even though he was clearly informed of the standard expected of him, the law in Mississippi recognizes that there is no need to warn an employee before firing him for sexual harassment. *Hust v. Forrest General Hospital*, 762 So.2d 298, 301, P7 (Miss. 2000). As has been generally recognized, "Even in the absence of any policy, an organization still has the inherent right to take action against employees who engage in disruptive or threatening behavior." Whitten, Mosley, "Article. Caught in the Crossfire: Employers' Liability for Workplace Violence," 70 *Miss. L.J.* 505, n. 267 (Winter, 2000). Mr. Gillis was, in fact, on notice from the Employee Handbook that he could be fired immediately for sexually explicit language and sexual harassment.

Even if insanity or mental infirmity is a legally recognized defense, which it is not, there is no medical or other expert testimony on this record indicating that Gillis was mentally unable to control his actions. Instead, that was apparently a conclusion the ALJ reached on her own from Gillis' statements that he had, indeed, acted offensively to his fellow employee. Even if insanity were a defense here, which it is not, without supportive testimony, the ALJ's apparent conclusions are arbitrary and capricious.

VII. The Employer would have faced liability had it not fired the Claimant.

Mississippi law has held an employer subject to liability for infliction of emotional distress where it did not immediately terminate a sexual harassing employee. *Jones v. B.L.*

Development Corp., 940 So.2d 961 (Miss. Ct. App. 2006). In that case, the Court of Appeals held the employer, B. L. Development, "is vicariously liable for the negligent acts of its employees which were committed within the employee's scope of employment. *Odier v. Sumrall*, 353 So.2d 1370, 1372 (Miss. 1978). An employer is likewise vicariously liable for intentional torts committed in the course and scope of employment, or for those it authorized, or for those it ratified. *McClinton v. Delta Pride Catfish, Inc.*, 792 So.2d 968, 976 (Miss. 2001). Where an employer learns of the past intentional conduct and does nothing to reprimand the employee, this acts as a ratification." *Id.*, at 966, P17. SkyHawke must not be put in a position where, in order to avoid unemployment liability, it might be held to have ratified sexual harassment for failing to remove the offending employee from the work place.

There is a cause of action for negligent hiring and for negligent retention of employees. In *Country Club v. Turner*, 4 So.2d 718, 719 (Miss. 1941), the Mississippi Supreme Court explained the general principle that:

> compliance with the duty to use reasonable care to maintain working conditions that are reasonably safe involves the duty to use such care in avoiding the employment or retention of a servant who is known to be dangerous or vicious where such propensities are calculated to expose co-employees to greater dangers than the work necessarily entails.

In the present case, the employer was worried enough to call the police to escort Ms. Gillis out of the building. SkyHawke was under a duty to remove Shawn Gillis from the workplace.

Mississippi law further provides that a female employee is entitled to unemployment benefits if she voluntarily leaves her job because of sexual harassment. *Hoerner v. Miss. Employment Sec. Comm.*, 693 So.2d 1343 (Miss. 1997). If the harassment victim in this case had left SkyHawke because of Shawn Gillis's behavior, her voluntary quit would have left SkyHawke responsible for her unemployment benefits at the same time that the current ruling

would make them responsible for Shawn Gillis's eligibility for benefits. *Id.* The Commission cannot have it both ways.

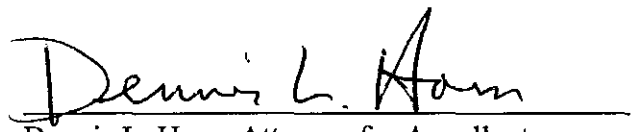
To rule that Mr. Gillis remains entitled to unemployment benefits because he was not engaged in misconduct puts the employer in an impossible position under federal law as well. A company can be sued for Title VII violations for allowing sexual harassment in the work place. 42 U.S.C. § 2000e. This Court knows that employers must meet federal guidelines. For example, in *Southwood Door Co. v. Burton, supra,* 838-841 at P20 - P27, the Court weighed federal drug testing requirements in an unemployment setting. Title VII requirements are no less pervasive.

Further, a company is put in jeopardy for not firing a sexual harassing employee since insurance coverage will not pay to defend sexual harassment charges because such behavior cannot be, contrary to the ALJ Opinion, below, merely accidental. *Panko Architects v. St. Paul Fire and Marine Ins. Co.,* 1996 U.S. Dist. LEXIS 4814 (N.D. Ca. 1996). Again, it would create a legal conundrum to penalize SkyHawke for terminating the sexual harasser while the company is under a duty to do just that.

CONCLUSION

The decision that claimant Shawn Gillis was not fired for misconduct within the meaning of State law for unemployment insurance purposes is arbitrary and capricious, contrary to substantial evidence, and error in fact and in law. The decision cannot stand. This Court must find Shawn Gillis was fired for misconduct and reverse and render the decision entered below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis L. Horn, Attorney for Appellant, SkyHawke Technologies, LLC, certify that I have this day served a copy of the above and foregoing *Brief of Appellant, SkyHawke Technologies, LLC,* by U.S. Mail, postage prepaid, on the following persons at these addresses:

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This the 17th day of August, 2011.

Dennis L. Horn