

IN THE SUPREME COURT OF MISSISSIPPI

MENKEM ONYIA

APPELLANT

VS.

NO. 2011-CC-01476

**MISSISSIPPI DEPARTMENT OF EMPLOYMENT
SECURITY (MDES)**

APPELLEE

**APPEAL FROM CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
HONORABLE JEFF WEILL, SR. CIRCUIT JUDGE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned, Menkem Onyia, the Appellant, 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 Court of Appeals may evaluate possible disqualification or recusal.

1. Integrated Management Services (IMS)
2. Mississippi Department of Employment Security (MDES)
3. Administrative Judge, Jan Topolski
4. Judge Jeff Weill, Sr.
5. Menkem Onyia



Menkem Onyia

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BRIEF OF APPELLANT MENKEM ONYIA

STATEMENT OF ISSUES

Did Appellant timely file his appeal within the period allowed for filing such appeal and in accordance with at least one of the five permissible methods for filing the appeal, thus requiring the reversal of both the MDES Board of Review's initial decision dated December 30, 2010 and the decision of Judge Jeff Weill, Sr., dated July 19, 2011 on Appellant's appeal?

STATEMENT OF THE CASE

In summary, this is a case of whether Appellant's appeal of Judge Jan Topolsky's November 19, 2010 decision was timely filed within the period allowed for filing such appeal in accordance with at least one of the five permissible methods for filing the appeal and in accordance with § 71-5-519 B of the Mississippi Department of Employment Security Law.

By way of background, Appellant timely appealed the initial determination of MDES which concluded that Appellant voluntarily left employment without good cause by not contacting and informing the employer of his delay in Nigeria from returning to work in the USA. On November 19, 2010, Administrative Law Judge Jan Topolski affirmed the determination of MDES that Appellant voluntarily left employment without good cause by not contacting and informing the employer of his delay in Nigeria from returning to work in the USA after a telephonic hearing he conducted on November 18, 2010. During the telephonic hearing on November 18, 2010, Judge Topolski asked

Appellant whether he had contacted or attempted to contact his "employer" while he was in Nigeria to inform the employer of his status of returning to work. Appellant misinterpreted "employer" in the question to mean contacting the President and COO of the company, Rod Hill, who was the subject of discussion in reference to Appellant's previous submitted statement to Judge Topolski regarding this matter. At the time of the question by Judge Topolski, Appellant answered "no" which led to Judge Topolski's affirmative decision. However, following the telephonic hearing, Appellant realized that "employer" applies to not only the President and COO of the company, but also to agents and staff of employer. Thus, as described in Appellant's subsequent appeal briefs and filings, he did in fact contact agents and staff of the employer through the employer's Engineers, Bernard LeBlanc ("LeBlanc") and Keble Ward ("Ward") several times while in Nigeria, thus showing Appellant's reasonable efforts to inform the Employer of his delay in Nigeria. It was during these several calls with LeBlanc and Ward that Appellant explained to them the political situation in Nigeria and why he could not return to work in the USA because of the death of the President of Nigeria at that time, placing the country in a state of turmoil. Appellant supported this fact with evidence in the form of US cell phone records of both LeBlanc and Ward which evidence the calls received from Appellant's telephone number 0112348031373255 in Port Harcourt, Nigeria, as well as sworn affidavits of both LeBlanc and Ward in support of this.

Subsequent to Judge Topolsky's November 19, 2010 decision Appellant timely filed an appeal of this decision. Appellant did so by complying with the filing deadline by telephonically calling MDES (601-321-6503) on December 3, 2010, and speaking with a staff member of MDES named Janice. Appellant told Janice that by the telephone call, Appellant is placing MDES Board

of Review on notice of Appellant's filing of appeal. Appellant then informed Janice that a copy of the appeal was sent on December 2, 2010 via US Postal Service Certified Mail, Return Receipt Requested, and further inquired with Janice as to whether or not it was necessary for him to send a copy of the appeal via fax to ensure that the MDES Board of Review received it. Janice responded, "No, it is not necessary to send a fax since you have now informed us of your filing the appeal and that you also sent the appeal via US Postal Service, Certified Mail, Return Receipt Requested." However, Janice did state that she would send a message to the MDES Board of Review that Appellant timely filed the appeal through the telephone call, which Janice did. MDES Board of Review records will confirm this assertion because Appellant's subsequent telephone calls to MDES (601-321-6503) confirmed that Janice sent messages to the MDES Board of Review informing it that Appellant's appeal was file on December 2, 2010, and December 3, 2010 by telephone call to MDES which she received and further that the MDES Board of Review was notified of the same by MDES staff member Janice on December 3, 2010. See Attachment B for copies of the US Postal Service receipts for Certified Mail, Postage and completed Return Receipt Requested, signed by Jerry Burkett of MDES Board of Review.

Notwithstanding all of the above noted chain of events, on December 9, 2010, Appellant received the completed Return Receipt Requested form signed by Jerry Burkett of the MDES, with an incorrect stamped Date of delivery as November 6, 2010 instead of December 6, 2010 (See Item (3) of Attachment B, copy of completed Return Receipt Requested). Then, on December 11, 2010, Appellant received the MDES Board of Review Acknowledgement of Appeal Filed, dated December 10, 2010, copy attached (see Attachment C). Following this, on January 5, 2011, Appellant received the MDES Board of Review Decision of December 30, 2010,

dismissing the Appellant's appeal based on the incorrect conclusion that Appellant's appeal was not timely filed in accordance with § 71-5-519 B of the Mississippi Department of Employment Security Law – by December 3, 2010. See the attached copies of MDES Board of Review Decision (Attachment D).

In light of the MDES Board of Review's December 30, 2010 decision, Appellant then filed an appeal of that decision, properly contending that the December 30, 2010 decision should be reversed because Appellant timely filed his appeal of Administrative Law Judge, Jan Topolski's November 19, 2010 decision via at least two of the permissible methods for filing. Judge Jeff Weill Sr. rendered a decision on Appellant's appeal on July 19, 2011, affirming the MDES Board of Review's December 30, 2010 decision. As a result, Appellant now appeals to this Honorable Court for a review of the underlying decisions in this matter so that Appellant will be afforded proper due process in this matter and ultimately be afforded the opportunity to have his case proceed to a decision on the merits of his claim.

SUMMARY OF ARGUMENT

This case surrounds the main issue of whether or not Appellant timely filed his appeal of the MDES's November 19, 2010 decision. Appellant did in fact timely file his appeal in accordance with §§ 71-5-517 and 71-5-519 of the Mississippi Department of Employment Security Law. Moreover, he did so by *more than one* of the *five* permissible methods for filing. Unfortunately, due to administrative error on the part of MDES staff, Appellant's appeal was not properly recorded as received in December 2010. Rather, it was improperly recorded as received in November 2010, which was clearly incorrect and impossible based on the procedural history and relevant dates in this matter.

Nonetheless, the improper recording of the date shows error and negligence on behalf of MDES staff and thus supports a showing of good cause by Appellant and his contention that his appeal was timely filed. Where there is clear evidence of administrative error in a matter such as this case, the Court should err on the side of the Appellant as to allow the Appellant his right and fair opportunity to be heard on his appeal and the merits of his claim. As such, Appellant contends that the underlying decisions should be reversed and that his case should proceed to a decision based on the merits of his claim.

ARGUMENT

I. The MDES Board of Review decision dated December 30, 2010 should be reversed because Appellant timely filed his appeal of Administrative Law Judge, Jan Topolski's November 19, 2010 decision via at least two of the permissible methods for filing

Pursuant to §§ 71-5-517 and 71-5-519 of the Mississippi Department of Employment Security Law, there are five permissible methods for filing an appeal:

- (1) Delivery by the United States postal Services to the address provided on the determination or decision being appealed;***
- (2) Faxing to the number provided in the determination or decision being appealed;***
- (3) In-person at any WIN Job Center;***
- (4) Electronically at the address provided in the determination or decision being appealed; or***
- (5) Telephonically by calling the number provided on the determination or decision being appealed.***

Brown v. Miss. Dep't of Empl. Sec., 29 So. 3d 766 (Miss. 2010).

Appellant had until December 3, 2010 to file his appeal in this matter. As stated by Appellant in his previous submission to the lower Court, Appellant utilized methods number one and five listed above. Appellant sent his appeal via US Postal Service via Certified Mail, Return Receipt Requested on **December 2, 2010** (see Attachments A and B). Further, Appellant also contacted the MDES Board of Review via a telephone call to 601-321-6503 on **December 3,**

2010 to notify MDES of the filing of his appeal. Appellant spoke with a staff member of MDES named Janice on December 3, 2010. Appellant told Janice that by the telephone call, Appellant is placing MDES Board of Review on notice of Appellant's filing of appeal. Appellant then informed Janice that a copy of the appeal was sent on December 2, 2010 via US Postal Service Certified Mail, Return Receipt Requested, and further inquired with Janice as to whether or not it was necessary for him to send a copy of the appeal via method number 2, fax, to ensure that the MDES Board of Review received it. Appellant wanted to ensure that his appeal was timely filed and received by the MDES Board of Review and he was willing to file his appeal via more than one of the permissible methods of filing if necessary. Nonetheless, Janice responded, **"No, it is not necessary to send a fax since you have now informed us of your filing the appeal and that you also sent the appeal via US Postal Service, Certified Mail, Return Receipt Requested."** However, Janice did state that she would send a message to the MDES Board of Review that Appellant timely filed the appeal through the telephone call, which Janice did on December 3, 2010 – MDES Board of Review records will support this as Janice sent messages to the MDES Board of Review as stated above.

In its previous submission to Judge Jeff Weill, Sr. of the lower Court (see Attachment E), Appellee contends that Appellant did not speak with MDES staff member Janice at the number listed above. Appellant strongly disagrees with Appellee's assertion in this regard as he did in fact speak with the staff member named Janice as stated previously. Appellee is partially correct however – Appellant did **not** speak with any MDES staff member on **December 2, 2010** as Appellant never made any statement to that fact. Rather, as Appellant has stated throughout his correspondence related to this matter, he spoke with Janice on **December 3,**

2010 (see Appellant's Brief dated April 25, 2011, pages 2-3). Appellant contacted the telephone number provided to him in the November 19, 2010 decision and yes, he did in fact press "1" to file his appeal. It was then that he was connected to Janice in the call center and he gave her the notification of his appeal as stated above. In further support of this, Appellant respectfully requested that Judge Jeff Weill, Sr. of the lower Court contact the employee (Janice) and request that she provide testimony attesting to the fact that she spoke with Appellant and took his appeal via the telephone on December 3, 2010. Additionally, Appellant also requested that the MDES Board of Review records be obtained and reviewed as they will support these facts as Janice also sent messages to the MDES Board of Review informing it that Appellant's appeal was filed via mail on December 2, 2010, and that Appellant filed telephonically on December 3, 2010 by telephone call placed to and received by MDES. Neither of these requests was fulfilled by Judge Jeff Weill, Sr. of the lower Court.

Notwithstanding, by filing his appeal via the US Postal Service via Certified Mail, Return Receipt Requested on December 2, 2010 and via the telephonic call to MDES Board of Review on December 3, 2010 which placed the MDES Board of Review on notice of Appellant's filing of the appeal, Appellant met the requirements for filing a timely appeal in this matter in accordance with the methods and procedures for filing appeals as established under the applicable Mississippi Laws.

II. Appellant is able to show good cause for his appeal being deemed to be untimely due to clear administrative error on the part of MDES staff as acknowledged by Appellee

Should this Honorable Court not find that Appellant's appeal was timely filed, Appellant properly contends that if that is the case, it is a result of acknowledged administrative error on the part of MDES staff and he is thus able to satisfy a showing of good cause.

By way of background, on December 9, 2010, Appellant received the completed Return Receipt Requested form in connection with his appeal to the MDES Board of Review signed by Jerry Burkett of the MDES, with a stamped Date of delivery as **November 6, 2010** instead of December 6, 2010 (See Item (3) of Attachment B, copy of completed Return Receipt Requested). On December 11, 2010, Appellant received the MDES Board of Review Acknowledgement of Appeal Filed, dated December 10, 2010, copy attached (see Attachment C). Then, on January 5, 2011, Appellant received the MDES Board of Review Decision of December 30, 2010, dismissing the Appellant's appeal based on the incorrect conclusion that Appellant's appeal was not timely filed in accordance with § 71-5-519 B of the Mississippi Department of Employment Security Law – by December 3, 2010. See the attached copies of MDES Board of Review Decision (Attachment D).

As evidenced by the attached supporting documentation, it is clear that Jerry Burkett of the MDES incorrectly dated the Return Receipt Requested form with the date of **November 6, 2010**. Even Appellee agreed in its Brief to Judge Jeff Weill, Sr. of the lower court (see Attachment E) that Appellant's submission was incorrectly stamped November 6, 2010 and thus acknowledges the **administrative error** on behalf of MDES as Appellant's submission was not sent until December 2, 2010. Thus, by Appellee's own admission and acknowledgement, administrative errors did in fact occur in this case with respect to Appellant's filings.

Timeliness of the filings of appeals is critical in these cases as a claimant may be precluded from asserting his rights to an appeal if the appeal is not received within the requisite fourteen day time period. As a result of this aspect of the appeals process being extremely critical to the ultimate appeal being sought, MDES has the burden and responsibility to ensure

that it takes care and caution when receiving and documenting the receipt of the appeals. Appellee in this instance did **not** show responsibility or care in this regard. Again, this is evidenced by the acknowledged error with respect to the date stamp on Appellant's appeal. The date on which the appeal was received by MDES is of critical and significant importance and as such, MDES has the duty to ensure that the date is properly recorded for records purposes. Unfortunately, Appellee already has admitted that it failed in this regard to exhibit such care with respect to recording the proper month in which the appeal was received.

Appellant is firm in his belief and contends that this same type of administrative error could very likely also have occurred with respect to the **day** of the month on which the Appellant's appeal was received and recorded by the MDES and that this error most likely did in fact occur. Can Appellee ensure that this same type of administrative error was not also made with respect to the day on which Appellant's appeal was received? No. Is Appellant confident that no other administrative errors occurred by MDES in his case that could potentially prohibit him from his right to have his appeal heard? No, he is not. The evidence in this case has already shown at least two errors by MDES: the first error being with respect to the date stamp of Appellant's appeal discussed herein, and the second being Appellee's incorrect assertion that Appellant contacted MDES on **December 2, 2010** instead of the actual date Appellant did place the call, which was on **December 3, 2010**. This second error is evidenced on page six of Appellee's Brief to Judge Jeff Weill, Sr. of the lower court (see Attachment E, P. 6). As clarified by Appellant in this filing in section I above, he did not contact MDES on December 2, 2010, nor did he ever make any statement to that fact. Nonetheless, MDES confidently asserts that he did - in error. Both of these errors (particularly the administrative error regarding the

date stamp) do not support any belief that MDES took the care and caution it needed with respect to the handling of Appellant's appeal. Rather, these errors support a finding of negligence by MDES in the handling of Appellant's appeal claim.

Where there is clear evidence of administrative error by the MDES Board of Review as there is in the instant case, this Honorable Court should err on the side of the Appellant as to allow the Appellant his right and fair opportunity to be heard on his appeal and the merits of his claim, as opposed to dismissing his appeal due to procedural and non-substantive reasons, most likely due to administrative error on the part of Appellee, as acknowledged, evidenced and noted above. Appellant is clear that the law so far in this regard has been stringent with respect to timeliness of filings, however, Appellant contends and asserts that his circumstances fall within an exception in this area due to the fact that Appellee has shown it has been negligent with respect to the proper recording of the date on which his appeal was received. As such, Appellant is able to show good cause with respect to the filing of his appeal and respectfully requests that this Honorable Court allow him the opportunity to have his appeal heard and decided on the merits.

III. Appellant did not cause the event which caused his appeal to be deemed to be untimely filed, and thus as he is able to show good cause, the statutory time limit may be extended as it has affected Appellant's substantial rights

Appellant firmly contends that his appeal was timely filed as expressed above. However, in the event that his appeal is deemed to be untimely by this Honorable Court and not filed within the fourteen days as required by §§ 71-5-517 and 71-5-519 of the Mississippi Code, it would be as a result of administrative error that he did not cause, and thus, Appellant asserts that the time

limit for filing his appeal may be extended under the circumstances and in accordance with case law supporting the same.

§ 71-5-517 of the Mississippi Department of Employment Security Law provides in pertinent part:

The claimant or any party to the initial determination or amended initial determination may file an appeal from such initial determination or amended initial determination within fourteen (14) days after notification thereof, or after the date such notification was sent to his last known address.

Miss.Code Ann. § 71-5-517 (Rev.2000)

Further, § 71-5-519 of the Mississippi Department of Employment Security Law provides in pertinent part:

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

Miss.Code Ann. § 71-5-519 (Rev.2000)

Additionally, the Court in Wilkerson v. Miss. Emp. Sec. Comm'n, 630 So. 2d 1000 (Miss. 1994) specifically allows for an extension of the statutory time limit where Appellant is able to show good cause and he did not cause the event which caused his appeal to be deemed untimely. As is known by this Honorable Court, there have been many cases which have been appealed on the basis of timeliness of the appeal filings. Wilkerson is such a case. In this case, while the majority of the Court found that MDES was not authorized to accept an appeal outside of the fourteen (14) day appeal time period, the Court did allow for a "relaxation of the standard" where "good cause" is shown. Id. At 1002. In the instant case, Appellant is able to support a showing of "good cause" as outlined by the Wilkerson Court due to the administrative error which occurred and has been discussed above in section II.

Further, Appellant points to the opinion of the minority of the Court in Wilkerson in which Justice Lee and Justice Smith specifically foresaw the problems with interpretation of the statute as the Court did in Wilkerson with respect to *when* the fourteen (14) day period for filing the appeal begins to run. As expressed by the Honorable Justice Lee, fairness requires that the full fourteen day period be afforded to the Appellant and that period cannot reasonably begin on *both* the date of mailing *and* the date of notification, as these two dates are almost always different dates. Justice Lee asserts that the proper date to begin calculating the fourteen day time period is the date of notification. Appellant contends the same. However, should this Honorable Court not find Appellant's argument in this respect compelling, Appellant still contends that the statutory time period should be relaxed under the circumstances in light of the fact that an administrative error occurred due to MDES staff, due to no fault of Appellant, and as a result Appellant is able to satisfy a showing of good cause.

IV. As Appellant timely filed his appeal and is able to establish good cause, it is clear that Judge Jeff Weill Sr.'s failure to review evidence in support of the same by Appellant demonstrates clear prejudice and bias to Appellant's case.

Notwithstanding the fact that Appellant used *at least* one of the five permissible methods of filing his appeal as noted above, Appellant provided detailed evidence and facts to support the events that transpired as detailed above and in the underlying record of Appellant. Appellant respectfully requested that Judge Jeff Weill, Sr., in part of his duties in performing a full and complete review of the case before him, act on the request of Appellant to contact the employee named Janice at MDES who received the telephone call and obtain testimony attesting to the fact that Janice spoke with Appellant and took Appellant's appeal over the telephone on December 3, 2010.

Further, Appellant respectfully requested that Judge Jeff Weill, Sr. obtain and review the records of MDES Board of Review to show and support the fact that Janice also did send a message to MDES Board of Review informing it that Appellant filed his appeal via telephonically on December 3, 2010. Neither of these requests of Appellant were fulfilled or even allowed by Judge Jeff Weill, Sr. to be performed, and thus, Appellant contends that this is clearly prejudicial to his case and ultimate decision rendered by Judge Jeff Weill, Sr.

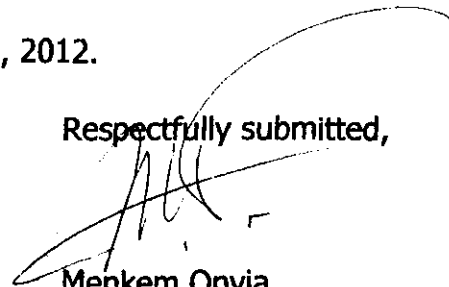
CONCLUSION

Wherefore, in light of the reasons and evidence presented above, as well as the supporting documentation, Appellant is able to show that he has in fact complied with § 71-5-517 and § 71-5-519 of the Mississippi Department of Employment Security Law and timely filed his appeal within the deadline of December 3, 2010 by more than one of the permissible methods for doing so: via the telephonic call to MDES Board of Review on December 3, 2010 which placed the MDES Board of Review on notice of Appellant's filing of the appeal; and via US Postal Service via Certified Mail, Return Receipt Requested on December 2, 2010. Further, Appellant is able to show good cause for any finding of his appeal being untimely as a result of clear and acknowledged administrative error by MDES, and as a result he is thus entitled to an extension of the statutory time limit for filing his appeal. Appellant has in fact provided supporting evidence and sound explanation as to the events that occurred in his case with respect to the filing of his appeal that support that his appeal should be heard. Therefore, Appellant respectfully requests that the Supreme Court of Mississippi reverse both the July 19, 2011 decision of Judge Jeff Weill, Sr. and the December 30, 2010 decision of MDES Board of Review so that his appeal

may proceed to a decision based on the merits of his claim. Appellant is confident and hopeful that based on the above, this Honorable Court will provide Appellant with the justice and adequate redress.

THIS, the 20th day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Menkem Onyia', is written over the 'Respectfully submitted,' text. The signature is stylized with a large, sweeping flourish that extends upwards and to the right.

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IN THE SUPREME COURT OF MISSISSIPPI

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SECURITY (MDES)**

APPELLEE

**APPEAL FROM CIRCUIT COURT OF
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CERTIFICATE OF SERVICE

I, Menkem Onyia, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of my brief in the above styled and numbered cause to:

Office of Legal Affairs
P. O. Box 1699
Jackson, MS 29215
(601) 321-6076 Fax

WITNESS my signature on this 20th day of January, 2012



Menkem Onyia