

COAE

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

BRENDA JACKSON

APPELLANT

VS.

CAUSE NO. 2012-CC-01590

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

**BRIEF OF APPELLEE
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
STATE OF MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

OF COUNSEL:

**ALBERT BOZEMAN WHITE
ASSISTANT GENERAL COUNSEL
MS BAR NO. [REDACTED]**

**LEANNE F. BRADY
SENIOR ATTORNEY**

**MS BAR NO. [REDACTED]
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
POST OFFICE BOX 1699
JACKSON, MS 39215-1699
Telephone: (601) 321-6073
Facsimile: (601) 321-6076**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CASES AND OTHER AUTHORITIES.....	iii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	5
Standard of Review.....	5
Record Evidence	6
Case Authorities and Argument.....	10
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	15

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

BRENDA JACKSON

APPELLANT

VS.

CAUSE NO. 2012-CC-01590

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

1. Mississippi Department of Employment Security, Appellee
2. Albert Bozeman White, Assistant General Counsel for Appellee
3. LeAnne Brady, Senior Attorney for the Appellee
4. Brenda Jackson, Appellant, *Pro Se*
5. Jackson Public Schools Board of Trustees, Employer
6. Hon. William Gowan, District 7 Circuit Court Judge

This the 7th day of June, 2013.

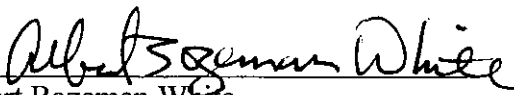

Albert Bozeman White
Assistant General Counsel (MS [REDACTED])
Mississippi Department of Employment Security
LeAnne F. Brady
Senior Attorney (MSD # [REDACTED])
Mississippi Department of Employment Security

TABLE OF CASES AND OTHER AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Barnett v. Mississippi Employment Security Comm’n</u> 583 So. 2d 193 (Miss. 1991)	5
<u>Caraway vs. Mississippi Employment Security Commission</u> 826 So.2d 100 (Miss. Ct. App. 2002)	13
<u>Hodge vs. Mississippi Employment Security Commission</u> 757 So. 2d 268 (Miss. 2000)	10
<u>Hollingsworth v. Mississippi Department of Employment Security</u> 976 So. 2d 393 (Miss. Ct. App. 2008)	14
<u>McLaurin v. Mississippi Employment Security Comm’n</u> 435 So. 2d 1170 (Miss. 1983)	3
<u>Mississippi Employment Security Commission vs. Fortenberry</u> 193 So. 2d 142 (Miss. 1966)	6, 10
<u>NCI Building Components v. Berry</u> 811 So. 2d 321 (Miss. Ct. App. 2001)	10
<u>Richardson v. Mississippi Employment Security Comm’n</u> ,..... 593 So. 2d 31 (Miss. 1992)	5
<u>Waldrup v. Mississippi Employment Sec. Comm’n</u> 951 So. 2d 597 (Miss. Ct. App. 2007)	10, 11
<u>Westbrook v. Mississippi Employment Security Comm’n</u> 910 So. 2d 1135 (Miss. Ct. App. 2005)	11, 13
<u>Wheeler v. Arriola</u> , 408 So. 2d 1381 (Miss. 1982)	5
 <u>OTHER AUTHORITIES</u>	
Mississippi Code Annotated § 71-5-19(4)	1, 4, 11, 12, 14
Mississippi Code Annotated § 71-5-513 (A)(1)(a)	1, 3, 5, 6
Mississippi Code Annotated § 71-5-513 (A)(1)(c)	3

Mississippi Code Annotated	5
§ 71-5-531	
Mississippi Unemployment Insurance Regulation	6
309.00	
Uniform Rules of Circuit Court	9
Rule 5.01	

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

BRENDA JACKSON

APPELLANT

VS.

CAUSE NO. 2012-CC-01590

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY**

APPELLEE

**BRIEF OF APPELLEE
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY**

STATEMENT OF THE ISSUE

- I. Whether the Claimant, Brenda Jackson, should be disqualified from receiving unemployment benefits pursuant to Mississippi Code Annotated Section 71-5-513 (1)(a) because she voluntarily quit her employment with Jackson Public Schools Board of Trustees without good cause?
- II. Whether the Claimant, Brenda Jackson, is obligated to repay the assessed overpayment on the unpaid balance and any accrued interest, pursuant to Mississippi Code Annotated Section 71-5-19(4)?

STATEMENT OF THE CASE

Brenda Jackson [hereinafter also referred to as "Claimant"] was employed by Jackson Public Schools Board of Trustees [hereinafter also referred to as "Employer"] as a substitute teacher from February 7, 2011, until her separation occurred on May 13, 2011. (R. Vol. 2 p.1, 62-63). Ms. Jackson voluntarily left her employment to move to Dallas, Texas, and seek other employment. (R. Vol. 2, p.7-8).

Ms. Jackson filed an Initial Claim for Benefits on June 2, 2011, indicating that she was laid off due to lack of work. (R. Vol. 2, p.1). A Claims Examiner investigated the facts and

circumstances, and found that she voluntarily left work to relocate. (R. Vol. 2, p. 9, 11). This is not considered good cause for leaving work under the Mississippi Employment Security Law. (R. Vol. 2, p.9, 11). Therefore, Ms. Jackson was disqualified from receiving benefits. (R. Vol. 2, p.9, 11). Additionally, she was found to have an overpayment in the amount of \$705.00 for receiving benefits during weeks ending June 11, 2011, to June 25, 2011. (R. Vol. 2, p.11).

Ms. Jackson appealed to the Administrative Law Judge [hereinafter also referred to as "ALJ"] on July 5, 2011. (R. Vol. 2, p.13). A hearing was held on September 8, 2011, at which Ms. Jackson, a witness for Ms. Jackson, an Employer representative, and a witness for the Employer participated. (R. Vol. 2, p. 30-101). Ms. Jackson also tendered six (6) exhibits into evidence. (R. Vol. 2, p. 91-100). Based upon the testimony and evidence presented at the hearing, the ALJ found that the Claimant voluntarily left her employment to relocate, finding as follows, to wit:

FINDINGS OF FACT

Based upon the record, testimony, and certain documents of evidence the Administrative Law Judge finds as follows:

The claimant worked from February 07, 2011 until May 27, 2011 with the Jackson, Mississippi Public School System as a substitute teacher when she left her employment to relocate to Royse City, Texas.

The claimant had a reasonable assurance of returning to work for the Jackson Public School System next successive school term at the time she left her employment. The claimant had no prospects of other work at the time of her separation. (Emphasis added).

The claimant collected \$705 in benefits for the weeks ending June 11, 2011 through June 25, 2011. On July 01, 2011 an Adjudicator for the Mississippi Department of Employment Security disqualified the claimant from the receipt of benefits effective May 26, 2011 based on her reason for separation from employment. The disqualification assessed to the claimant by the Adjudicator cause the claimant to be overpaid \$705 in benefits.

REASONING AND CONCLUSION

Section 71-5-513 A (1) (a) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits if he left work voluntarily without good cause. Section 71-5-513 A (1) (c) provides that in a voluntary leaving case, the claimant has the burden to establish good cause for voluntarily leaving his employment.

Section 71-5-19(4) of the Law states, any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact, irrespective of whether such nondisclosure or misrepresentation was known or fraudulent, or who, for any other reason has received any such benefits under this chapter, while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall be liable to repay to the Department for the unemployment compensation fund a sum equal to the amount so received by him.

Mississippi Department Security Regulation 405.00 provides that interest accrues at the rate of one per centum (1%) per month on the unpaid principal balance beginning with the month following the month in which the overpayment is established.

The Mississippi Supreme Court held in the case of John McLauren, ET. AL., Trustees of Newton County Unit School District vs. Mississippi Employment Security Commission and Terry W. McElheney, 435 So. 2d 1170 (Miss. 1983), that employers who choose to be reimbursable cannot be granted a non-charge under an (sic) circumstances.

An employee who has a reasonable assurance of returning to work for an academic institution in the next successive academic term is an employee of that academic institution until it is established there is no work available.

The claimant had a reasonable assurance of returning to work for the Jackson Public School System in the next successive academic term and chose to leave her employment to relocate to Texas. To be held eligible for benefits when you leave work, you must prove you left for reasons attributable to the employer. Leaving to relocate is not leaving for reasons attributable to the employer. (Emphasis added).

The determination issued by the Mississippi Department of Employment Security will be modified only to change the effective date of the disqualification period.

DECISION

The determination issued by the Mississippi Department of Employment Security is modified.

The claimant is disqualified from receipt of benefits effective May 28, 2011 until returning to work and earning eight times her weekly benefit amount in covered employment. The claimant is obligated to repay the assessed overpayment plus any interest that may accrue on the unpaid balance.

The employer is registered as a reimbursable employer and cannot be granted a relief from charges under the Law.

OVERPAYMENT

You received Unemployment Insurance benefits you were not entitled to receive in the amount of \$705.00 for weeks ending 06/11/2011 to 06/25/2011. Section 71-5-19(4) of the Mississippi Employment Security Law provides that a claimant will be liable to repay Unemployment Insurance benefits received when the claimant was disqualified from receiving Unemployment Insurance benefits. Immediate payment should be made to MDES. Interest will accrue at the rate of one percent per month on the unpaid balance.

(R. Vol. 2 p.103-104).

Aggrieved by the ALJ's decision, the Claimant timely appealed to the Board of Review on September 21, 2011. (R. Vol. 2, p. 106). On October 13, 2011, after careful review and consideration of the record, the Board of Review affirmed the ALJ's decision. (R. Vol. 2, p.112, 114). On October 31, 2011, the Claimant appealed the decision of the Board of Review to the Circuit Court of Hinds County, Mississippi. (R. Vol. 2, p. 115).

MDES filed its Answer and the record transcript on November 23, 2011. (R. Vol. 1, p. 4-5). Afterwards, both the Claimant and MDES filed Briefs. (R. Vol. 1, p. 6-29, 47-59, 62-67). On March 12, 2012, the Circuit Court entered its Order affirming the decision of MDES. (R. Vol. 1, p. 68-69). In so doing, the Court noted that to be eligible for continued employment in the up-coming school year, substitute teachers must attend a summer workshop, and that Ms. Jackson was given notice, but chose not to attend because she moved out of state. Thus, the Court found that MDES correctly determined that Ms. Jackson voluntarily quit her employment without good cause. (R. Vol. 1, p. 68-69).

SUMMARY OF THE ARGUMENT

The primary issue is whether the Claimant, Brenda Jackson, voluntarily quit her employment without good cause. Mississippi Code Annotated Section 71-5-513A(1)(a) provides for disqualifying persons from benefits, otherwise eligible, for leaving work voluntarily without good cause. The record shows that the Claimant voluntarily left her position to relocate to seek other employment. This is a domestic or personal decision; and thus, is not good cause under the law. This Honorable Court should affirm the decision of the Board of Review and Circuit Court, and deny the Claimant unemployment benefits.

ARGUMENT

I. Standard of Review

The provisions of Mississippi Code Annotated Section 71-5-531, govern this appeal. That section provides that the Circuit Court will consider the record made before the Board of Review of the Mississippi Department of Employment Security, and absent fraud, will accept the Findings of Fact supported by substantial evidence. Richardson v. Miss. Emp. Sec. Comm'n., 593 So. 2d 31 (Miss. 1992); Barnett v. Miss. Emp. Sec. Comm'n., 583 So. 2d 193 (Miss.1991); Wheeler v. Arriola, 408 So. 2d 1381 (Miss. 1982)

In Barnett, the Mississippi Supreme Court stated that:

{J}udicial review, under Miss Code Ann. Section 71-5-531 (1972), is in most circumstances, limited to questions of law, to-wit:

In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said shall be confined to questions of law.

Barnett, 583 So. 2d at 195. Furthermore, if the Board's findings are supported by substantial evidence and the relevant law was properly applied, then the reviewing court must affirm. Id.

Miss. Code Ann. Section 71-5-513 (A)(1)(a) provides for disqualifying persons from benefits, otherwise eligible, for leaving work voluntarily without good cause. Further, it is the employee's, and not the employer's, duty to prove that the reason for quitting amounted to good cause. Further, the question of whether a claimant voluntarily quit, or was terminated, is a question of fact to be determined by the ALJ and Board of Review. Miss. Emp. Sec. Comm'n. v. Fortenberry, 193 So. 2d 142, 143 (Miss. 1966).

Additionally, Miss. Code Ann. Section 71-5-513 (A)(1)(a) states that marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this subsection.

MDES Unemployment Insurance Regulation 309.00 (effective November, 30, 2009) defines good cause as follows:

If the employment conditions or circumstances leading to claimant's voluntary separation from employment are such that an ordinary prudent employee would leave their employment, the claimant has demonstrated good cause, for the purpose of Miss. Code Ann. Section 71-5-513. Additionally, claimant must show that after exploring alternatives to quitting, and after making reasonable efforts to preserve their employment, an ordinary prudent person would be compelled to voluntarily quit their employment.

II. Whether the Board of Review's decision finding that the Claimant, Brenda Jackson, failed to prove she had good cause for leaving her employment should be affirmed.

In the case *sub judice*, Ms. Jackson worked for Jackson Public Schools Board of Trustees as a substitute teacher from February 7, 2011, until her separation occurred on May 13, 2011. (R. Vol. 2, p. 1, 37, 62-63). Ms. Jackson voluntarily left her employment with Jackson Public Schools Board of Trustees to relocate. (R. Vol. 2, p.39).

At the hearing before the ALJ, Ms. Jackson testified that she was never informed she had continued work from the Employer; therefore, as she had bills to pay, she had no other choice

but to relocate and find another job. (R. Vol. 2, p.38-39). When the ALJ asked the Claimant if she had quit her employment, Ms. Jackson stated the following:

. . . No sir, it's substitute teaching. If they call you on . . . based on availability, what they need and, um . . . after the middle of May it was toward, it was the end of the school year and they told me, ah . . . the school, tha-, I had worked at one school particularly most of the time, and they told me that most of the time for substitute teachin by the middle, middle of the month, they don't call you no more because they are wrapping up there, ah . . . giving the last teachings. They are getting together for the results of tests, you know, they givin their final tests and things like that so the middle of May I w-, I waited for, for, for somebody to call me but no, the schools didn't call me and neither did the substitute office so it's not that I didn't wanna work. I wanted to work. I needed to work, but nobody called me. So that's the reason why I didn't work.

(R. Vol. 2, p.38). This testimony indicated that she was not discharged, but simply had not been called to work during May 2011.

When the ALJ asked Ms. Jackson if the Employer informed her of any work beginning the next school year, Ms. Jackson testified:

They didn't tell me I have a job. **They didn't tell me I was, I was fired. They didn't tell me I couldn't work.** I was given no information at all so my understanding was I cannot sit at home June and July when I have bills too, and, you know, **financial obligations** comin in and not do anything so **I did the only thing that I knew to do that worked for me**, you know, I, I re-, ah . . . **relocated to find a job** so nobody told me I had a job promised in, in August, nobody did, not even the school that I worked for or the public schools, you know, substitute (inaudible) anything. If I didn't, I wasn't given that, that information. (Emphasis added).

(R. Vol. 2, p.39). Ms. Jackson further testified:

I moved to Royse City the, toward the end of the year. I waited and waited for 2 weeks. **I left that Thursday, the last day of school . . . I left because I knew bills was comin in and I didn't have any, any money comin in so that's the reason why** I left so I could have some . . . decent food. (Emphasis added).

(R. Vol. 2, p.39-40).

Ms. Sandra Lyons, Coordinator for Classified Staffing, represented the Employer and testified on its behalf. Ms. Lyons testified that substitute teachers are required to attend a mandatory substitute workshop during the summer. (R. Vol. 2, p. 63). However, Ms. Jackson

did not attend. Ms. Lyons testified that if Ms. Jackson had attended the workshop, she would have had a reassurance that she would be a substitute for the new school year. (R. Vol. 2, p. 63). Ms. Lyons also testified that employees are informed of this workshop at their time of hire. (R. Vol. 2, p. 51, 64-65, 79, 80).

In addition, Ms. Lyons testified that Ms. Jackson was sent a letter informing her of the workshop details; however, Ms. Jackson called and informed the Employer that she was moving to Texas. (R. Vol. 2 p. 65). Ms. Lyons stated:

But I'm, I'm thinkin that durin that same time period is when Ms. Jackson also informed Ms. Shelton, because in her folder it states that she called and informed Ms. Shelton that she was relocating to Dallas, Texas, but of course we didn't have a resignation form so it was a verbal resignation over the phone. When someone calls to say they're relocating, that's a verbal resignation." (Emphasis added).

(R. Vol. 2, p. 65).

Ms. Jo Ann Shelton, Personnel Specialist, testified that she mailed the letter regarding the workshop to Ms. Jackson in June. Afterwards, she received a call from Ms. Jackson informing her that she would not attend the workshop because she was relocating. (R. Vol. 2, p. 77). In addition, Ms. Jackson admitted sending a formal resignation to the Employer via e-mail. (R. Vol. 2, p. 67-68).

Ms. Shelton further testified that Ms. Jackson was supposedly going to fax or e-mail a statement to the Employer indicating that she would not be able to sub for the coming school year; however, she never received any documents. (R. Vol. 2, p. 78). Ms. Jackson testified that she had already moved to Texas on May 31, 2011; she could not attend the workshop, even if she had received the notice letter. (R. Vol. 2, p. 85).

Earlier in the hearing, Ms. Jackson testified that she did not resign from her employment because she did not know she had to resign, as she was not told it was necessary. (R. Vol. 2, p. 53). However, Ms. Jackson later stated, "[I] e-mailed Ms., ah . . . JoAnn a letter of resignation at

the end of May before I left." (R. Vol. 2, p. 67). Ms. Jackson also states in her Brief that she moved because, ". . . my personal reason is that financial situation was seriously in trouble beyond my control."

Additionally, Ms. Jackson admitted in her Brief that she was informed in February 2011, that "no one would be guaranteed a job for the next term unless they attend a summer training session". However, it was Ms. Jackson's unsupported contention that as she was not mailed a letter informing her of the mandatory workshop, she was not given an opportunity to attend. Therefore, she believed she was not promised a job for the next school term.

MDES asserts that Ms. Jackson did not show good cause for voluntarily leaving her employment, nor did she prove that she was laid off due to lack of work, as she claims in her Brief. Ms. Jackson stated during the hearing, "[T]hey **didn't tell me I was, I was fired. They didn't tell me I couldn't work.**" (R. Vol. 2, p. 39).

Moreover, Ms. Jackson attached documents to her Brief to the Circuit Court that were not presented during the hearing before the ALJ. Under Rule 5.01 of the *Uniform Rules of Circuit Court*, appeals to the Circuit Court from administrative agencies shall be on the record, and not a trial de novo. Therefore, these documents should be disregarded and stricken from the record.

Ms. Jackson's testimony proves she voluntarily left her employment to relocate due to financial obligations. In that regard, Ms. Jackson testified:

Um . . . you know, I, I, **I never thought that you, you, you couldn't relocate and, and it be okay.** I, I, you know, I just w-wanted to know, **I don't understand why this was a problem because people relocate all the time and, you know, I relocated here in good faith for financial reasons.** (Emphasis added).

(R. Vol. 2, p.61). Since the facts show that continuing work was available to Ms. Jackson, she has not shown good cause for voluntarily leaving her employment.

Moreover, domestic circumstances and obligations are not good cause to voluntarily leave employment. In this case, Ms. Jackson admitted the essential facts supporting the finding that she voluntarily quit her job without good cause based on domestic circumstances, i.e. financial conditions.

In Fortenberry, the Court found that “the eligibility and disqualification provisions set out the *Mississippi Employment Security Law* clearly indicate that this law is for the protection of persons who are part of the force of working employees who are ready, willing and able to perform their work, but who, through no fault of theirs, are not permitted to do so, and the law is not to be used to reward those who, for reasons of their own, refuse to work at suitable employment.” Fortenberry, 193 So. 2d at 144. Further, in Hodge v. Mississippi Employment Sec. Comm’n, 757 So. 2d 268 (Miss. 2000) the Court stated that the appellate Courts are bound by the Department’s decision as to whether an employee voluntarily quit or was discharged, as long as there is substantial evidence supporting that decision.

The case of NCI Building Components v. Berry, 811 So. 2d 321 (Miss. Ct. App. 2001) is instructive, because it not only sets out the employee’s obligations, but the judicial deference to which MDES decisions are entitled. The Berry case again sets out an employee’s obligation to take reasonable steps to comply with the employer’s request, and protect his/her job. The case also recognizes that the appellate Courts should give judicial deference to MDES’s decisions regarding the separation issue, even where the testimony is conflicting on whether a quit or discharge occurred.

Ms. Jackson’s testimony shows that she voluntarily left employment due to financial circumstances. However, this does not establish good cause under the law. In that regard, the case of Waldrup v. Mississippi Employment Sec. Com’n, 951 So.2d 597 (Miss. Ct. App. 2007) is also instructive here.

In Waldrup, the issue was whether Mr. Waldrup had good cause for voluntarily leaving his employment. The facts indicated that Mr. Waldrup voluntarily resigned his position because he was unhappy that he did not receive a pay raise or promotion, and because the Employer refused his request to take the remainder of a week off with pay. Mr. Waldrup then handed in his keys. Based on these facts, the Court held that Mr. Waldrup voluntarily quit his job. Although Mr. Waldrup was dissatisfied with his pay, he failed to show that his dissatisfaction gave him good cause to quit under the Employment Security Law. *See also Westbrook v. Miss. Employment Sec Comm'n*, 910 So. 2d. 1135 (Miss. Ct. App. 2005)(quitting work to pursue educational opportunities does not provide good cause for so doing).

Similarly, since Ms. Jackson admittedly left her employment due to financial conditions, moved to Dallas, Texas to better her employment opportunities, and did not respond to notifications to attend the summer workshop necessary for continued employment as a substitute teacher, this Honorable Court should affirm the decision of the Board of Review and Circuit Court denying Ms. Jackson unemployment benefits.

III. Whether the Claimant, Brenda Jackson, is obligated to repay the assessed overpayment and any accrued interest on the unpaid balance.

Pursuant to Miss. Code Ann. Section 71-5-19 (4) (a) (i) thru (iii)(Rev. 2007), an overpayment of benefits occurs when a person receives benefits:

- (i) While any condition for receipt of benefits ... was not fulfilled...; or
- (ii) While he (she) was disqualified from receiving benefits; or
- (iii) **While such person receives benefits and is later found to be disqualified or ineligible for any reason, including, but not limited to redetermination or reversal by the department or the court of a previous decision to award such benefits.** *Id.* (Emphasis added).

This statute, applicable to the overpayment of benefits, was amended in 2007 to include subsections (i) through (iii) to provide that an overpayment occurs simply where a claimant has been found eligible to receive benefits, and does receive benefits, but is later found to be ineligible for any reason.

Further, sub-sections (b) and (c) of 71-5-19(4) were enacted in 2007 so that the MDES may be entitled to seek remedies at-law, in addition to offsetting future benefits. Pursuant to sub-section (b) and (c), **any person receiving an overpayment shall be liable for deduction of the overpayment from future benefits, or liable for repayment to the Department for the Unemployment Compensation Fund a sum equal to the overpayment amount so received by him; and such sum shall be collectible in the manner provided in Sections 71-5-363 through 71-5-383 for the collection of past-due contributions.** *Id.* (Emphasis added). No Court of Appeals or Supreme Court cases have been decided applying these 2007 amendments, and the case precedents prior to these amendments regarding the rights of the MDES to take legal action to collect overpayments should be inapplicable to an overpayment occurring since 2007.

Further, in addition to the statutory provisions in 71-5-19(4), pursuant to *Benefit Payment Control Regulation* Nos. 400 through 406, adopted December 1, 2007, the Department is entitled to pursue collection where the overpayment resulted from a redetermination or reversal during an appeal. See *Regulation No. 403*. Further, pursuant to *Regulation No. 400* and *405*, the Department is entitled to overset future benefits, and is entitled to repayment of benefits previously erroneously paid to a claimant for any reason, plus interest accruing at the rate of one per centum (1%) per month on the unpaid principal balance, beginning with the month following the month in which the overpayment was established. A copy of to *Benefit Payment Control Regulation* Nos. 400 through 406 are attached hereto as Exhibit "A".

Ms. Jackson' testimony shows that she voluntarily left employment when there was continuing work available for her. It is not necessary that Ms. Jackson defrauded MDES to be liable for repayment, under the July 1, 2007, revised statute. In *Westbrook*, supra, p. 1139, even prior to this amendment, the Court of Appeals recognizes that the MDES is entitled to repayment when a previous award of benefits has been reversed during appeals. Further, as set out above, pursuant to Benefit Payment Control Regulation Nos. 400 through 406, the Department is entitled to offset, or re-coop, an overpayment, whether the overpayment was the result of fraud or non-fraud, and simply due to a redetermination.

However, MDES acknowledges that there is case law that has not been overturned by any subsequent ruling that establishes a five-part test that must be met in order to collect an overpayment of benefits. In *Caraway v. Miss. Emp. Sec. Comm'n*, this Court held that the Department may directly pursue collection measures against a claimant, only upon a finding that: "(1) [a] person received benefits, (2) at a time when he was ineligible, (3) by reason of nondisclosure or a misrepresentation of a material fact, (4) made by that person or another, (5) irrespective of fraudulent intent or knowledge of the omitted or misrepresented fact." *Caraway*, 826 So. 2d 100, 102-3 (¶8) (Miss. Ct. App. 2002) (quoting *Miss. Emp. Sec. Comm'n v. Sellers*, 505 So. 2d 281, 283 (Miss. 1987))

MDES does not waive its position that since the statute in question has changed, these cases can longer be relied on. Moreover, MDES asserts that this test defeats the legislative intent of the statute and affects the Department's ability to maintain the Unemployment Compensation Fund. However, if this Court continues to uphold this test as the standard, MDES asserts that this test can be met in the case at bar.

Clearly, element number one (1) has been met and MDES is certain that there is substantial evidence to support element number two (2). The Department further asserts that at

the time Ms. Jackson filed her claim, she was required to state her reason for separation. On her initial claim form under reason for separation, she indicated she was "laid off/lack of work." (R. Vol. 2, p.1). She did not indicate that she voluntarily quit her job to relocate. This nondisclosure resulted in Ms. Jackson receiving benefits for the weeks in question. MDES did not learn that Ms. Jackson had quit her job to relocate until after it had conducted its initial investigation. MDES asserts that this nondisclosure by the Claimant satisfies elements three (3), four (4) and five (5). See Hollingsworth v. Miss. Dept. of Emp. Sec., 976 So.2d 393, (¶¶17-20) (Miss. Ct. App. 2008).

Therefore, this Honorable Court should affirm the decision of the Board of Review and Circuit Court, and find that the Claimant is liable for repaying the assessed overpayment and any accrued interest on the unpaid balance pursuant to Mississippi Code Annotated Section 71-5-19(4).

CONCLUSION

There is substantial evidence in the record to support the findings of fact and the opinion of the Board of Review and Circuit Court that Ms. Jackson voluntarily quit her job without good cause and is therefore disqualified from receiving unemployment benefits under the Mississippi Employment Security Law. Additionally, Ms. Jackson is obligated to repay the assessed overpayment and any accrued interest on the unpaid balance. This Honorable Court should affirm the decisions of the Circuit Court and Board of Review in this matter.

RESPECTFULLY SUBMITTED, this the 7th day of June, 2013.

MISSISSIPPI DEPARTMENT
OF EMPLOYMENT SECURITY

By: Albert Bozeman White
Albert Bozeman White

OF COUNSEL:

Albert Bozeman White
Assistant General Counsel
LeAnne Brady
Senior Attorney
Post Office Box 1699
Jackson, MS 39215-1699
MSB No.7132
Tel. (601) 321-6074

CERTIFICATE OF SERVICE


I, Albert Bozeman White, Assistant General Counsel for the Mississippi Department of Employment Security, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to:

Honorable William Gowan
District 7 Circuit Court Judge
P.O. Box 22711
Jackson, MS 39225-2711

Ms. Brenda Jackson
9083 State Highway 276
Royse City, TX 75189-6405

Jackson Public Schools Board of Trustees
P.O. Box 2338
Jackson, MS 39225-2338

This the 7th day of June, 2013.



Albert Bozeman White