

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00951 COA**

**MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION AND FITZGERALD'S OF
ROBINSONVILLE**

APPELLANT

v.

JOE N. TOLLIVER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	07/31/96
TRIAL JUDGE:	HON. ROBERT LEWIS GIBBS
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ALBERT B. WHITE
ATTORNEY FOR APPELLEE:	NO ATTORNEY LISTED
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES (OTHER THAN WORKER'S COMPENSATION)
TRIAL COURT DISPOSITION:	CIRCUIT COURT REVERSED COMMISSION FINDING THAT COMMISSION FAILED TO MEET ITS BURDEN OF PROOF.
DISPOSITION:	REVERSED AND RENDERED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HERRING, J., FOR THE COURT:

The Mississippi Employment Security Commission (MESC) appeals a decision of the Circuit Court of the First Judicial District of Hinds County in which the circuit court ruled that Joe Tolliver, the employee, was entitled to unemployment benefits. We reverse and render.

A. THE FACTS

Joe Tolliver was the lead steward for Fitzgerald's Casino of Robinsonville, the employer, from June 14, 1994, to August 18, 1995. On July 27, 1995, Tolliver was placed on a sixty-day probationary period because of excessive absences. According to the employer, Tolliver was warned that

additional absences during the probationary period would result in a further reprimand which could include termination.

Fitzgerald's had a penalty point system in place which dealt with employee absenteeism. Failing to report to work without telephoning the supervisor would result in the employee receiving four and one-half points against him. When an employee arrived late to work, the employee was assessed with one point. When the employee missed work and called in, but did not have a medical excuse, court appointment, or other justifiable excuse for missing work, the employee was assessed one point. According to the policy, an employee of Fitzgerald's was subject to termination for when he accumulated eight and one-half penalty points assessed against him. At the time of Tolliver's probation, he had accumulated nine penalty points.

On August 16, 1995, Tolliver did not report to work. He was terminated by his employer on August 18, 1995. In a report labeled "Personnel Action Form," Fitzgerald's stated that Tolliver was terminated because of his "inability to work scheduled shifts." On August 21, 1995, Tolliver signed at the bottom of this form, thereby acknowledging its receipt, without making comments. Thereafter, he submitted an application for unemployment benefits with the MESC. After an investigation, the MESC determined that the employer had not shown that Tolliver was terminated for misconduct associated with his employment and that Tolliver was entitled to unemployment benefits. Fitzgerald's appealed the decision of the MESC to its Board of Review, and a hearing was held before an MESC appeals referee appointed by the Board of Review. Following the hearing, the appeals referee concluded that Tolliver was properly terminated by Fitzgerald's for misconduct associated with his employment. Specifically, the appeals referee found that Tolliver was unjustifiably absent for seven days in 1995 and late for work on two other days in 1995. In addition, the referee specifically found that Tolliver had been given warnings in regard to his absences in May, June, and July of 1995. Thus, in his opinion, the referee concluded that Tolliver had been discharged from Fitzgerald's because of excessive absenteeism, which constituted misconduct under applicable Mississippi law. Therefore, Fitzgerald's was within its right to terminate Tolliver because of his misconduct, thereby precluding Tolliver from being eligible for unemployment benefits.

Because Tolliver was found ineligible for employment benefits, the MESC requested that he repay to MESC the sum of \$1,260 which had been previously paid to Tolliver in unemployment benefits after his termination. Tolliver appealed to the MESC Board of Review. In his appeal, Tolliver alleged that he was misinformed as to what issues would be addressed at the hearing before the appeals referee. He claimed that he had been advised that the issue to be addressed was his inability to work the scheduled shifts. Instead, the attorney referee focused on his absences from work, as well as his arriving late for work. Thus, Tolliver claimed that he was unprepared to defend himself and that he did not bring to the hearing documentation in regard to the reasons for his absences. The Board of Review considered the record made before the appeals referee and affirmed the referee's decision.

Tolliver appealed the decision of the Board of Review to the Circuit Court of the First Judicial District of Hinds County, Mississippi. After considering the record on appeal and after hearing oral argument, the circuit court acknowledged that Tolliver's employment records are "permeated with instances of absenteeism and warnings from his supervisor that his attendance record had to improve or disciplinary action would have to be taken against him." However, the court reversed the decision of the Board of Review and ruled that Tolliver was entitled to receive unemployment benefits. In its

decision, the circuit court ruled that all written communications from the MESC to Tolliver in regard to his hearing before the appeals referee provided that he was terminated because of his inability to work scheduled shifts. Thus, the circuit court ruled:

Only evidence related to this claim should have been considered by the Board unless Fitzgerald's proved by clear and convincing evidence that the phrase 'inability to work scheduled shifts' referred to Tolliver's excessive absenteeism and that Tolliver knew that was the reason for his termination.

Furthermore, the court stated:

It would be fundamentally unfair to allow an employer to inform an employee that he or she is being discharged for one reason and at [the] hearing allow that same employer to present a different reason on which it argues the employee should be disqualified from receiving benefits.

Based upon this reasoning, the circuit court reversed the Board of Review's decision and noted that the record was devoid of any evidence to support the Board's ruling that Tolliver was terminated because of misconduct. It is from this decision that MESC appeals.

B. THE ISSUES

On appeal, the MESC raises the following issues:

I. WHETHER THE CIRCUIT COURT ERRED BY REVERSING THE BOARD OF REVIEW DECISION FINDING THAT THE EMPLOYER PROVED BY SUBSTANTIAL EVIDENCE THAT JOE TOLLIVER, APPELLEE, VIOLATED COMPANY POLICY, AND THAT SUCH VIOLATIONS CONSTITUTED DISQUALIFYING MISCONDUCT PURSUANT TO SECTION § 71-5-513A(1)(b) OF THE MISSISSIPPI CODE AS AMENDED.

II. WHETHER THE CIRCUIT COURT ERRED BY FINDING THAT THE EMPLOYER TERMINATED APPELLEE FOR ONE REASON AND AT THE REFEREE HEARING PRESENTED PROOF OF MISCONDUCT BASED ON ANOTHER REASON.

III. WHETHER THE CIRCUIT COURT ERRED IN REVERSING THE BOARD OF REVIEW BECAUSE THE EMPLOYER PRESENTED EVIDENCE OF APPELLEE'S EXCESSIVE ABSENTEEISM, INSTEAD OF APPELLEE'S INABILITY TO WORK SCHEDULED SHIFTS.

IV. WHETHER THE CIRCUIT COURT ERRED IN REVERSING THE DECISION OF THE BOARD OF REVIEW AS UNSUPPORTED BY SUBSTANTIAL EVIDENCE WHEN IT ALSO FOUND THE RECORD "PERMEATED WITH INSTANCES OF ABSENTEEISM AND WARNINGS."

All of these issues will be analyzed together since they essentially deal with the question of whether Tolliver was guilty of misconduct. We will also deal with the issue raised by the circuit court as to whether Tolliver was given adequate notice of the reason for his termination.

C. THE ANALYSIS

Tolliver did not file a brief in response to the appeal of the MESC. The general rule is that the failure of an appellee to file a brief is tantamount to a confession of error unless the appellate court concludes that, after a review of the record, no error was committed by the lower court. *Snow Lake Shore Prop. Owners Corp. v. Smith*, 610 So. 2d 357, 360-61 (Miss. 1992). Nevertheless, in cases involving Mississippi's unemployment compensation law, we will consider a matter to give full effect to Mississippi unemployment compensation law, notwithstanding the employee's failure to participate in the appeals process or otherwise to comply with our appellate rules. *Mississippi Employment Sec. Comm'n v. Lee*, 580 So. 2d 1227, 1228 (Miss. 1991).

The standard of review in appeals from decisions of the MESC is limited and is codified in **Section § 71-5-531 of the Mississippi Code** as amended, as follows:

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

The word "evidence" as used in Section 71-5-531 has been interpreted to mean "substantial evidence." *Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 425 (Miss. 1991). Thus, the circuit court and this Court must accept the findings of fact of the Board of Review so long as there was substantial evidence in the record to support such findings in the absence of fraud. Pursuant to the standard set out by the Mississippi legislature, this Court confines its review in cases such as this to issues of law where substantial evidence has been presented which supports the Board's factual findings. *Wheeler v. Arriola*, 408 So. 2d 1381, 1384 (Miss. 1982).

Section 71 -5-513 (A)(1)(b) of the Mississippi Code as amended states that an employee may be disqualified for unemployment benefits as a result of misconduct connected with the employee's work. The term "misconduct," as used in Section 71-5-513(A)(1)(b) has been defined by our Mississippi Supreme Court 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 employees. . . . Put another way, "[m]isconduct imports conduct that reasonable and fair minded external observers would consider a wanton disregard of the employer's legitimate interests."

Mississippi Employment Sec. Comm'n v. Percy, 641 So. 2d 1172, 1175 (citing *Mississippi Employment Sec. Comm'n v. Martin*, 568 So. 2d 725, 727 (Miss. 1990); *Wheeler v. Arriola*, 408 So. 2d 1381 (Miss. 1982); *Mississippi Employment Sec. Comm'n v. Phillips*, 562 So. 2d 115, 118 (Miss. 1990)).

The MESC's Board of Review adopted the findings and conclusions of the appeals referee. Those findings were that Tolliver was properly discharged for misconduct pursuant to Section 71-5-513 (A) (1)(b) because he violated his employer's attendance policy after being placed on sixty-day probation on July 27, 1995, and after he was warned that additional absences would lead to disciplinary action. After receiving this warning, Tolliver was absent from work on August 16, 1995, for "personal reasons" which he could not explain. Although the evidence showed that he had received a court summons on that day for non-payment of child support, the record is clear that Tolliver was not

required to go to court on August 16, 1995.

We conclude that the Board of Review's decision that Tolliver was guilty of misconduct pursuant to Section 71-5-513(A)(1)(b), which disqualified him from receiving unemployment benefits, was based upon substantial evidence. Since there has been no showing of fraud concerning the decision of the Board of Review, we must accept the Board's finding as correct and dispositive of the issues in this case, *unless* we also find that Tolliver was not given proper notice of the employer's reasons for his termination as a matter of law. The circuit court cited *Mississippi Employment Sec. Comm'n v. Gaines*, 580 So. 2d 1230,1232 (Miss. 1991) and stated, "the burden of proof is on the employer to show by substantial, clear and convincing, evidence that the claimant is disqualified." *See also Shannon Engineering & Const., Inc. v. Mississippi Employment Sec. Comm'n*, 549 So. 2d 446, 450 (Miss. 1989). The circuit court, citing *Love v. Mississippi State Bd. of Veterinary Examiners*, 230 Miss. 222, 92 So. 2d 463 (1956), takes the position that by advising the employee in its personnel action form (which was signed by Tolliver on August 21, 1995), that he was terminated because of his "inability to work scheduled shifts," the employer failed to properly advise Tolliver of the real reason for his termination, unauthorized and excessive absenteeism.

Love has been cited on numerous occasions by our Mississippi Supreme Court, as well as by various other state and federal courts, for the proposition that parties involved in a quasi-judicial proceeding are entitled to due process of law, including "not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Love*, 92 So. 2d at 467 (citation omitted); *see also McGowan v. Mississippi State Oil and Gas Bd.*, 604 So. 2d 312, 318 (Miss. 1992); *Harris v. Mississippi Real Estate Comm'n*, 500 So. 2d 958, 963-65 (Miss. 1986). At least one federal court has ruled that Mississippi's requirement of due process of law pursuant to the Fourteenth Amendment to the United States Constitution is similar to and "no stricter than, that applicable under federal constitutional law." *Davis v. Mann*, 721 F. Supp. 796, 805 (S.D. Miss. 1988). We rule that whether or not Tolliver was given reasonable notice of the claims against him and a reasonable opportunity to meet those claims is a question of law to be determined by this Court and not a question of fact. Thus, we must determine *de novo* whether Tolliver was afforded due process of law and given reasonable notice of the claims against him when he was advised that he was terminated because of his "inability to work scheduled shifts." We rule that Tolliver was given reasonable notice of the claims against him and was thereby afforded due process.

In 1926, the United States Supreme Court stated that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *Connally, v. General Const. Co.*, 269 U.S. 385, 391 (1926). On the other hand,

[a] rule or standard is not objectionable merely because it is stated in general terms and is not susceptible of precise application. Familiar examples of such general standards abound in our law, e.g., negligence, unconscionability, fraud. We doubt anyone would seriously argue today that these standards are unconstitutionally vague.

Harris, 500 So. 2d at 965 (citing *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Bd.*, 457 So. 2d 1298, 1323 (Miss. 1984) *rev'd on other grounds*, 474 U.S. 409 (1986)). Thus, a statute or regulation should be upheld unless constitutionally vague in all of its applications and where a claim

engages in clearly prohibited activities, a party should not be allowed to complain of the vagueness of the statute as to the conduct of others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

We rule by analogy that the reasoning set forth by the United States and Mississippi Supreme Courts concerning whether or not statutes or regulations are unconstitutionally vague applies in the case *sub judice* in determining whether Tolliver was adequately advised prior to his hearing as to why he was terminated. It is clear from the record that Tolliver had a number of unexcused and excused absences during his year of employment with Fitzgerald's. Only two and one-half weeks prior to his termination, Tolliver was given a written reprimand regarding his absences in addition to a warning that one more unexcused absence in the sixty day probationary period would result in further disciplinary action. Tolliver was absent from work on August 16, 1995, and had no legitimate excuse for his absence. On August 17, 1995, Tolliver's supervisor discussed his absenteeism with him. The supervisor suspended Tolliver from work pending an investigation of his absence on August 16, 1995, and the matter was turned over to the Fitzgerald's human resources department. Thereafter, Tolliver was terminated. On August 21, 1995, Tolliver signed a document reflecting that he was being terminated for his "inability to work scheduled shifts," although Tolliver claims that the reason for his termination was not on the document when he signed it. Nonetheless, we conclude that Tolliver was aware that he was being terminated for being absent from work as he was aware that he was on probation at the time for his absenteeism. We conclude that a reasonable person would have no doubt in this case as to why he was being terminated. We also rule that notice to Tolliver that he was being terminated because of his "inability to work scheduled shifts" was adequate notice to him that he was being terminated because of his absenteeism. Finally, we conclude and rule that Tolliver was afforded reasonable notice of the claims against him and had a reasonable opportunity to meet those claims in a fair hearing. Consequently, we reverse and render the decision of the circuit court and reinstate the decision of the MESB Board of Review.

THE JUDGMENT OF THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS REVERSED AND RENDERED.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., NOT PARTICIPATING.