

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

**NO. 2001-CC-01768-COA**

**TABITHA A. OTTO**

**APPELLANT**

**v.**

**MISSISSIPPI EMPLOYMENT SECURITY  
COMMISSION**

**APPELLEE**

DATE OF TRIAL COURT JUDGMENT: 11/2/2001  
TRIAL JUDGE: HON. RICHARD D. BOWEN  
COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: TABITHA A. OTTO (PRO SE)  
ATTORNEY FOR APPELLEE: ALBERT B. WHITE  
NATURE OF THE CASE: CIVIL - STATE BOARDS AND AGENCIES  
TRIAL COURT DISPOSITION: UNEMPLOYMENT BENEFITS DENIED  
DISPOSITION: AFFIRMED - 12/10/2002  
MOTION FOR REHEARING FILED:  
CERTIORARI FILED:  
MANDATE ISSUED:

**BEFORE MCMILLIN, C.J., BRIDGES AND THOMAS, JJ.**

**MCMILLIN, C.J., FOR THE COURT:**

¶1. Tabitha Otto filed for unemployment benefits. The Board of Review for the Mississippi Employment Security Commission found that Otto had been discharged for misconduct, disqualifying her from benefits. Here on appeal, Otto argues that this finding is not supported by the evidence. We find substantial evidence to support the decision. Therefore, we affirm.

I.  
Facts

¶2. Tabitha Otto had worked at Happy Day Child Care in Slatton, Mississippi for approximately two years prior to April 16, 2001. On that day, Otto and the director of the child care center, Darlene

Garrison, got into a disagreement concerning the care for one of the children. As a result, Otto went to another part of the facility to talk to the owners. They were not in. Otto informed the director that she was leaving but would be back later that day when the owners were likely to be present. According to evidence introduced at the Commission, the director asked her not to leave. Otto did anyway. She was terminated for having left work without permission.

¶3. Otto filed for unemployment compensation. The claims examiner found that Otto had quit her job in a manner that constituted misconduct. *See* Miss. Code Ann. 71-5-513 (A)(1)(b) (Rev. 2000). Though she sought review by an appeals referee, she did not attend the scheduled hearing. The appeals referee affirmed the claim examiner's findings.

¶4. Otto filed a notice of appeal to the Board of Review, claiming that she never received notice of the earlier-stage hearing. Otto, not represented by counsel, put on the form noting her appeal that "I do not agree with the decision. Also I did not get my letter to tell me when the hearing was. I have some witnesses for me." The Board then sent Otto a letter informing her that her appeal had been received. It would be considered on the record already made, unless the Board found that a further hearing would be necessary. In that case it would notify her of that hearing.

¶5. Without a hearing, the Board of Review affirmed that Otto was ineligible for unemployment compensation. The Lee County Circuit Court affirmed. Otto now appeals to this Court.

## II. Discussion

¶6. Factual findings of the Commission's Board of Review, if supported by substantial evidence, will be upheld on appeal. Miss. Code Ann. § 71-5-531 (Rev. 2000); *Williams v. Mississippi Emp. Sec. Comm'n*, 395 So. 2d 964, 966 (Miss. 1981) ("evidence" in statute means "substantial evidence.") Otto's

argument in this appeal is that the evidence presented by her former employer did not prove misconduct. Therefore, we must determine whether under the relevant law applicable to disqualification from benefits, there was substantial evidence of misconduct.

¶7. Prior to considering the evidence, we examine a procedural issue that Otto raises.

A.  
Rehearing

¶8. In her first issue, Otto asserts a due process violation. She believes that she was unfairly deprived of her right to notice and a hearing by the appeals referee. Because of this, she believes that she should have been granted a rehearing.

¶9. Otto claims that she never received notice from the appeals referee of the hearing. She alleges that on several occasions she did not receive mail from the Commission and had to go to the unemployment office and submit her claims forms. She did receive, though, a letter informing her of the outcome of the appeals referee's hearing that occurred without her. That letter stated this:

you may file an appeal with the Board of Review . . . or, if neither you nor your representative attended your hearing, you may file a written request with the Referee for a rehearing . . . . Your request should state the reason you failed to attend. The Referee will determine if good cause exists to grant a rehearing.

IF AN APPEAL IS TAKEN TO THE BOARD OF REVIEW, SUCH APPEAL WILL BE CONSIDERED ON THE RECORD PREVIOUSLY MADE AND NO HEARING BEFORE THE BOARD OF REVIEW WILL BE SCHEDULED.

¶10. Otto, proceeding without counsel, did not take this advice, perhaps not noticing it or else not understanding its significance. She did discuss her desires with an employment interviewer at the Tupelo MESC office, named Ruby Trimble. The result of that discussion was that a document was prepared, probably by Trimble, then signed by Otto that she wanted to appeal the decision. That document, which

appears to be a computer-generated form with specific information inserted regarding the case, mentioned that she had not received notice of the prior hearing and that "I have some witnesses for me."

¶11. The dissent would take this language to be a request for a hearing, the denial of which is found to be arbitrary and capricious. Instead, we find that the document is what it says it is -- an appeal. What Otto and Trimble discussed, why Otto signed a document that said that she was appealing and did not seek a rehearing, what Otto understood and what she may have misunderstood, cannot be reconstructed. She had been given notice that if she appealed, no more evidence would be taken. She had also been informed that she could request a rehearing in writing if she had not received notice of the earlier hearing. We acknowledge that Otto's appreciation of the distinctions between an appeal and a rehearing may have been minimal. It is also possible that Otto decided just to appeal based on the record that there was, perhaps in frustration over the process or pessimism about the effect of a rehearing. Misunderstanding or simple resignation are both plausible. There is no confusion, though, that she had received a document that said no more evidence was to be taken if she appealed, and signed another document that specifically requested an appeal.

¶12. As a result of this response, no further consideration was given to whether Otto had good cause for failing to attend her first hearing. The Commission then sent Otto a letter informing her that her appeal to the Board of Review had been received. The letter stated that her appeal would be considered on the record already made and no further hearing would be scheduled unless the Board informed her that it had determined such a hearing would be useful.

¶13. The Supreme Court has determined that the proper management of the court system requires that *pro se* parties conform to the same procedural requirements as do represented parties. *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 118 (Miss. 1987). Otto had a right to a hearing, failed both to

attend the initial hearing or, after being informed of her right, taking advantage of the opportunity to request a second hearing. There is no due process violation.

B.  
Substantial Evidence

¶14. The central issue on this appeal was whether misconduct was shown. Otto largely relies on the argument that since the Appeals Referee only heard the employer's side of the story, the referee's finding of statutory misconduct was unfairly reached. That is not enough, as responsibility for the failure to have her side of the story cannot be assigned to the Commission nor to the employer.

¶15. Otto next argues that the evidence presented by the director and the day care owner was not sufficient for a finding of misconduct. Disqualifying misconduct is defined as actions "evinced 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. . . ." *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982).

¶16. Garrison, who was the director who had the confrontation with Otto, testified that Otto refused to accept Garrison's instruction as to when the children in the nursery were in need of care. She stated that Otto insisted on leaving, even after Garrison had explained that, by leaving, she was going to be assumed to have quit her job. Garrison testified that such an extreme measure was needed because, as she explained to Otto, when Otto left the premises, she placed the child care center in the position of being in violation of regulations requiring two or more adults to be present with the number of children in the center. Based upon this testimony, the referee found that Otto had left her job in a manner which constituted misconduct. We agree that these actions could be characterized as a willful and wanton disregard of the

employer's interest, and to fall well short of standards of behavior which the employer has the right to expect.

¶17. These findings are supported by the only evidence in the record, and that evidence was substantial.

We affirm.

**¶18. THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT, UPHOLDING THE DENIAL OF UNEMPLOYMENT BENEFITS, IS AFFIRMED.**

**SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, MYERS, AND CHANDLER, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING AND BRANTLEY, JJ.**

**KING, P.J., DISSENTING:**

¶19. My review of the record of this case constrains me to dissent.

¶20. The majority affirms the denial of unemployment benefits to Otto by stating that the Board's decision was supported by substantial evidence, and should therefore be affirmed.

¶21. I agree that the record contains substantial evidence which supports the Board's denial of benefits. Indeed, I concede that the only testimony considered by the Board in the record supports the denial of benefits. However, it is this concession which also compels me to dissent.

¶22. For some two years prior to April 16, 2001, Otto had been employed as a childcare worker. On April 16, she left the job because of a disagreement with her supervisor. Terminated for this action, Otto filed for unemployment compensation.

¶23. An April 27, 2001 letter, directed to T. A. Otto, 988 CR 1409, Mooreville, MS 38857, from the claims examiner, informed Otto that benefits were denied. Otto appealed that decision, which triggered a hearing before an appeals referee.

¶24. On May 11, 2001, the appeals referee mailed notice of a May 21, 2001 hearing to Tabitha A. Otto, 988 CR 1409, Mooreville, MS 38858. Otto did not appear at the May 21, 2001 hearing. The owner and director of the childcare facility appeared and testified. Their testimony is the only testimony taken and made a part of the record.

¶25. Based upon their adverse testimony, the appeals referee denied benefits to Otto.

¶26. Following receipt of the appeal referee's denial of benefits, Otto contacted Ruby Trimble of the MESC, and expressed her dissatisfaction with the denial of benefits.

¶27. As reduced to writing by Trimble, Otto's dissatisfaction was "I do not agree with this decision. Also I did not get my letter to tell me when the hearing was. I have some witnesses for me." Trimble placed this statement on a MESC computer generated form styled "Notice of Appeal To Board of Review." Trimble had this form signed by Otto. The form is attached to this opinion as an appendix.

¶28. The statement attributed to Otto is a request for a hearing, not an appeal. It asks that she be given notice of the hearing date, and allowed to present her witnesses.

¶29. There is nothing to indicate that MESC, after receiving Otto's statement that she wished to have her witnesses heard, gave any consideration to providing Otto with a hearing. Instead, it proceeded to decide this matter only upon the adverse testimony offered by the childcare facility owner and director. Absent some identifiable reason in the record for not giving Otto the opportunity to present her witnesses, the actions of the MESC can at best be described as arbitrary and capricious. An arbitrary and capricious act, by its very definition, is not supported by substantial evidence. *Public Employees' Retirement System v. Shurden*, 822 So. 2d 258 (¶12) (Miss. 2002).

¶30. The majority notes that, as a pro se litigant, Otto is held to the same standard as a party represented by counsel. It would appear that the majority decision actually imposes a higher standard upon

Otto. Under Mississippi's notice pleading, a party is merely required to state what he wants and the basis for that request. *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So. 2d 977, 984 (Miss. 1992). Otto did just that. She wanted to be notified of the hearing and present her witnesses.

¶31. At the least, Otto was entitled to have that desire addressed. The failure to do so was an abuse of discretion.

¶32. In its desire to justify, what in my opinion, is an erroneous decision, the majority states, "It is also possible that Otto decided just to appeal based on the record that there was, perhaps in frustration over the process or pessimism about the effect of a rehearing. Misunderstanding or simple resignation are both plausible."

¶33. I find nothing to suggest that Otto decided to appeal on the record rather than seek a hearing. Indeed a full review of the record suggests the contrary.

¶34. In her brief filed with the Lee County Circuit Court, Otto identified two issues for the court's consideration. The very first issue was stated as "whether another hearing should have been scheduled after I notified MESC I did not receive notice of the hearing of May 21st 2001?"

¶35. This does not suggest an intent to appeal solely on the existing record.

¶36. In the fact portion of her brief, Otto stated:

After I filed for unemployment and was denied benefits, I did not receive notice of the hearing date. I had been having trouble receiving my claim forms and had gone to the office several times to fill out my unemployment claim. In the decision dated 23 May 2001, I was advised that the decision would be final after 14 days from May 23 unless an appeal with the Board of review was filed, or if I did not attend the hearing I could file a written request for rehearing within 14 days. It further stated my request should state the reason I failed to attend and if good cause existed I would be granted a rehearing. It further stated this could be filed at the nearest claim office or by a letter addressed to MESC.

On May 30, 2001 I filed notice that I had not been aware of the hearing date. On the day of the hearing I was not aware the hearing was being held. There had been several

prior occasions where the claim forms had not been received, and I went to the local unemployment office to obtain and submit the form. The day of the hearing I went to the office to turn in my claim form. If I had known the hearing was going to be held, I would have been there.

¶37. In her reply brief Otto states:

I filed an Appeal to get another hearing, but it was denied. I do not feel this is fair. They were aware that I had not received previous claims in the past, therefore they should have given me another hearing.

\* \* \* \*

If the MESC would have only given me a fair hearing then I could have proven my case. I have witnesses that actually heard and saw what went on. Also, the day care director, Darlene Garrison, has treated previous employees with the same inappropriate behavior.

¶38. These things would indicate a consistent intent and desire on the part of Otto to present her case, including her witnesses. Had Otto decided to appeal solely on the existing record, her statement about having witnesses would be meaningless.

¶39. I would reverse and remand this matter for a hearing.

**IRVING AND BRANTLEY, JJ., JOIN THIS SEPARATE OPINION.**