

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

FRANKLIN COLLECTION SERVICE

APPELLANT

VS.

CAUSE NO. 2014-CC-00555

**MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY AND
ANGELICA WESTBROOK**

APPELLEES

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

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

ORAL ARGUMENT NOT REQUESTED

OF COUNSEL:

**ALBERT BOZEMAN WHITE
ASSISTANT GENERAL COUNSEL
MS BAR NO. 7132
ANNA CRAIN CLEMMER
STAFF ATTORNEY
MS BAR NO. 104279
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
POST OFFICE BOX 1699
JACKSON, MS 39215-1699
Telephone: (601) 321-6074
Facsimile: (601) 321-6076**

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

FRANKLIN COLLECTION SERVICE

APPELLANT

VS.

CAUSE NO. 2014-TS-00555

**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. Anna Crain Clemmer, Staff Attorney for the Appellee
4. Franklin Collection Service, Appellant
5. Angelica Westbrook, Claimant
6. Hon. Jim S. Pounds District 1 Circuit Court Judge

This the 7th day of April, 2015.

/s/ Albert Bozeman White

Albert Bozeman White

Assistant General Counsel (MSB #7132)

Mississippi Department of Employment Security

Anna Crain Clemmer

Staff Attorney (MSB #104279)

Mississippi Department of Employment Security

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**BRIEF OF APPELLEE,
MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY
STATEMENT OF ISSUES**

Whether the Circuit Court and Board of Review decisions should be affirmed, finding that the Employer, **FRANKLIN COLLECTION SERVICE**, failed to prove by substantial, clear and convincing evidence that the Claimant, **ANGELICA WESTBROOK**, committed disqualifying misconduct, under Mississippi Code Annotated Section 71-5-513(A)(1)(b), by allegedly giving false information to a debtor while making a collection phone call?

STATEMENT OF THE CASE

Angelica Westbrook [hereinafter also "Claimant"] was employed by Franklin Collection Service [hereinafter also "Employer"] for ten (10) months as a collector, ending on July 26, 2011. (R. Vol. 2, p. 27). She was terminated for allegedly making a false statement during a collection phone call while speaking to a debtor when she told the debtor that a \$15.00 processing fee was an interest charge. However, Ms. Westbrook had no memory of informing the customer or debtor that a \$15.00 credit card processing fee was an interest charge. (R. Vol. 2, p. 13-14, 34-37). Ms. Westbrook's testimony also indicated that if she called the \$15.00 fee an interest charge, it was an

isolated, unintended mistake, such that the Employer failed to prove that she deliberately or willfully and wantonly violated the Employer's policy. (R. Vol. 2, p. 34-37).

After her termination, Ms. Westbrook filed for unemployment benefits. (R. Vol. 2, p. 1). A Claims Examiner investigated. (R. Vol. 2, p. 12-14). Ms. Westbrook was interviewed. The Employer did not respond to interview requests, but submitted a UI-21A form indicating that Ms. Westbrook was discharged for giving false information regarding a processing fee, which violated the Fair Debt Collection Practices Act ["FDCPA"]. (R. Vol. 2, p. 9). Ms. Westbrook stated that she did not recall making any false statements. She confirmed that she was accused of informing a customer that a \$15.00 fee was an interest charge. However, she did not recall having done so. (R. Vol. 2, p. 12-14). She was not previously warned about any past incidents prior to discharge. Based on this investigation, the Claims Examiner determined that the Employer failed to prove misconduct and awarded Ms. Westbrook benefits. (R. Vol. 2, p. 15).

The Employer appealed. (R. Vol. 2, p. 17). A hearing was noticed and held. (R. Vol. 2, p. 19-20, 22-39). Ms. Westbrook testified. Brittany Thomas, supervisor, testified for the Employer. (R. Vol. 2, p. 22-39).

Afterwards, the Administrative Law Judge [hereinafter also "ALJ"] affirmed the Claims Examiner's determination, finding that the Employer failed to prove misconduct. (R. Vol. 2, p. 41-43). In so doing, the ALJ found that while the Employer's witness testified that Ms. Westbrook called a \$15.00 processing fee an interest charge, the Employer failed to prove that she deliberately, falsely misrepresented the processing fee to be an interest charge. Thus, the ALJ concluded that the Employer failed to prove that Ms. Westbrook willfully and wantonly violated its policy and the FDCPA on the date in question; and awarded benefits.

The Employer appealed to the Board of Review. (R. Vol. 2, p. 69). Based on the record, after careful review, the Board of Review affirmed adopting the ALJ's Fact Findings and Decision. (R. Vol. 2, p. 75-76).

The ALJ's fact findings and decision were in pertinent part as follows, to-wit:

Findings of Fact

The claimant worked for the employer as a collector from September 10, 2010 until July 26, 2011.

The employer discharges an employee for giving false or misleading information to a debtor.

The employer monitors its collectors' calls. The employer's monitoring department notified the employer of an issue with one of the claimant's calls. The employer reviewed a recording of the call. The employer determined that the claimant referred to the employer's "processing" or "convenience" fee as an "interest" fee. The employer is a non-interest company. The claimant does not believe that she referred to the employer's fee as "interest." The employer discharged the claimant because the employer believed that she gave false or misleading information to a debtor.

Reasoning and Conclusion

Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department,... Section 71-5-513 A (1)(c) of the Mississippi Employment Security Law provides that in a discharge case, the employer has the burden to establish the claimant was discharged for misconduct connected to the employment.

Section 71-5-355 of the Mississippi Employment Security Law provides, in part, that an employer's experience rating shall be chargeable with benefits paid to a claimant, provided that an employer's experience rating shall not be chargeable if the Department finds that the claimant left work voluntarily without good cause connected with the work, was discharged for misconduct connected with the work, or refused an offer of available, suitable work with the employer.

In the Mississippi Supreme Court, in the case of Wheeler vs. Arriola, 408 So. 2d 1381 (Miss. 1982), the Court held that:

“The meaning of the term ‘misconduct’, as used in the Unemployment Compensation Statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered ‘misconduct’ within the meaning of the Statute.” *Wheeler v. Arriola*, 408 So. 2d 1381 (Miss. 1982).

The employer discharged the claimant after listening to a call in which she allegedly referred to an “interest” fee while speaking with a debtor. The employer maintains that the claimant gave false or misleading information to the debtor. The evidence on record does not establish that the claimant willfully or deliberately disregarded the employer's interests. The employer has the right to terminate the claimant's services for any reason it deems necessary; however, misconduct collected [connected] with the work has not been established. (Emphasis added).

Decision

The determination of the Mississippi Department of Employment Security is affirmed. If otherwise eligible, the claimant is entitled to benefits based on the reason for separation from employment. The employer's experience rating record is charged for benefits based on this issue.

(R. Vol. 2, p. 41-43).

From this decision, the Employer appealed to the Circuit Court of Lee County. (R. Vol. 2, p. 53-56) (R. Vol. 1, p. 3-4). After the MDES Answer and record, and after Briefs by the Employer and MDES were filed, the Circuit Court affirmed on March 21, 2014. (R. Vol. 1, p. 5-60, 64-67). In so doing, the Court addressed each of the Employer's arguments for reversal, finding that the ALJ's decision sufficiently set out the basis of her decision, and correctly applied the law to the facts. (R. Vol. 1, p. 64-67). In that regard, the Circuit Court's Order stated as follows, to-wit:

First, the Appellant alleges that the decision of the Board of Review was arbitrary because no explanation was given for the decision and was not supported by the facts. The Appellant argues that the Board of Review's lack of explanation is insufficient to inform the parties of the basis of the decision. Separately, the Appellant alleges that the decision was an error of law if it was based on the finding that the false statement was not "misconduct." The Administrative Law Judge in her "Reasoning and Conclusion" stated that the evidence presented at the hearing did not amount to conduct that "willfully and deliberately disregarded the employer's interests." R. at 43. The definition of misconduct, as cited by the Administrative Law Judge, is "conduct evidencing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees." *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982). Applying the facts to the law, the Administrative Law Judge found that the actions of the Claimant did not arise to the level of misconduct, contrary to what the Appellant continues to maintain. (Emphasis added).

Second, the Appellant alleges the decision was arbitrary because it was contrary to the evidence. The Administrative Law Judge made a "Findings of Fact" in her Decision that summarized everything that was testified to at the hearing. R. at 42. The Administrative Law Judge then cited law that she applied to the facts found in this case and came to the conclusion that the evidence presented at the hearing did not amount conduct that "willfully or deliberately disregarded the employer's interests." R. at 43. Conduct that willfully or deliberately disregards the employer's interests is the definition of misconduct as cited by the Administrative Law Judge. The Administrative Law Judge found that, based on the evidence, the employer failed to prove that the Claimant's actions were willful or deliberate. (Emphasis added).

Third, the Appellant alleges the decision was not supported by the evidence and was arbitrary because the readily available and conclusive evidence was not considered. The record show the Appellant received a "Notice of Telephone Hearing" dated September 27, 2011, which states that any documents submitted to MDES must also be sent to all other parties. R. at 21. It has also been common practice that each party is allowed to submit any documents he wants considered as evidence. The Appellant submitted documents for review, but those documents were not entered into evidence. The documents, however, were referred to and not once did the Appellant mention that a transcript, audio copy, or even a copy of the email detailing the false statement was submitted to MDES. R. at 28. In that case, the Administrative Law Judge considered all of the evidence that was made part of the record during the hearing in making her decision. (Emphasis added)

This Court having considered the appeal, on the record, and being now in all things fully advised and herein finds that the decision of the Board of Review of the Mississippi Department of Employment Security was supported by substantial

evidence, was not arbitrary, and contains no errors of law and that the same should be **AFFIRMED**.

IT IS THEREFORE ORDERED AND ADJUDGED that this cause be and the same is hereby **AFFIRMED** and shall be dismissed from the Circuit Court of Lee County, Mississippi.

(R. Vol. 1, p. 64-67).

The Employer then appealed the Circuit Court's decision to this Honorable Court. (R. Vol. 1 p. 72-73).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court and Court of Appeals has recognized certain circumstances that do not constitute misconduct under the Employment Security Law, even though the employer may be justified in discharging the employee. Typically, where the alleged misconduct is a single incident of an inadvertent error, or ordinary negligence, under the circumstances, or it is not clear that the alleged behavior falls within the employer's defined policy, there is no misconduct under the Employment Security Law. Shannon Engineering v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446 (Miss. 1989); Brandon v. Mississippi Employment Security Comm'n, 768 So. 2d 341 (Miss. 2000); Campbell v. Mississippi Employment Sec. Comm'n, 782 So. 2d 751 (Miss. Ct. App. 2000); Gordon v. Mississippi Employment Security Comm'n 864 So. 2d 1013 (Miss Ct. App. 2000); Sherman v. Mississippi Employment Sec Comm'n, 989 So. 2d 398 (Miss 2008). Further, although in some incidences a single violation of employer policy or behavior standards may constitute disqualifying misconduct, such as perhaps a serious willful and wanton or deliberate policy violation, untruthfulness, falsification or criminal behavior, where the alleged violation is questionable, or there are other reasonable explanations for the violation, or ordinary negligence in an isolated

incident, then typically MDES will require the employer to establish one or more warnings to the employee, and progressive discipline of the employee, and subsequent repeated violations by the employee. Barnes v. Mississippi Employment Security Commission, 853 So. 2d 153 (Miss Ct. App. 2003); Mississippi Employment Security Comm'n v. Jones 864 So. 2d 1013 (Miss Ct. App. 2000).

In the instant case, the Employer's assertion that Ms. Westbrook should be disqualified from receiving unemployment benefits is entirely based on the Employer proving she acted dishonestly by making a false statement, *i.e.* falsely misrepresented a \$15.00 credit card processing fee to be an interest charge. To do so, the Employer must not only prove that she made the statement, but that she lied, *i.e.* deliberately misrepresented a material fact. Based on the testimony, the Employer has failed to prove that Ms. Westbrook deliberately made a false statement. A "lie" is defined as "...a falsehood uttered for the purpose of deception; and intentional statement of untruth designed to mislead another; ... an untruth deliberately told." *Black's Law Dictionary*, p. 922 (6th Ed. 1990).

In this case, the Employer asserts that Ms. Westbrook's statement that the processing fee was an interest charge was a falsehood or lie. However, the Employer's proof fails to establish that she made the statement as a falsehood. The Employer has not satisfactorily established that Ms. Westbrook made the statement at all, or the tone or context; moreover, it has failed to establish through substantial evidence that the alleged statement was a lie. No transcript of the phone call recording or actual audio copy has been provided. The Employer fails to rebut Ms. Westbrook's credible, uncontroverted statements that she would not deliberately call the processing fee an interest charge, and that she does not even remember making that statement. Thus, the Board of Review, as the fact finder, may rely on this testimony to find that, at worst, her statement is an

isolated incident of ordinary negligence on her part, or inadvertent error; and the Employer fails to prove misconduct. Ordinary negligence in isolated incidents is not the standard for finding misconduct. Kemper County School District v. Mississippi Employment Security Commission, 832 So. 2d 548 (Miss. 2002). Based upon the standard of review in appellate cases from administrative agencies, this Honorable Court should accept the Circuit Court and Board of Review decisions and affirm.

ARGUMENT

Standard of Review

The Employer's appeal is governed by Mississippi Code Annotated Section 71-5-531 (Rev. 1995), which provides for an appeal by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the **appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied.** (Emphasis added). Richardson v. Mississippi Employment Security Commission, 593 So.2d 31 (1992); Barnett v. Mississippi Employment Security Commission, 583 So.2d 193 (Miss. 1991); Booth v. Mississippi Employment Security Commission, 588 So.2d 422 (Miss. 1991).

Further, a rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Security Commission, 639 So.2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Facts

In the instant case, Britney Thomas testified for the Employer. (R. Vol. 2, p. 26-33). Ms. Thomas confirmed that Mr. Westbrook was employed from September 10, 2010, until July 26,

2011, as a collector. (R. Vol. 2, p. 27). When questioned as to the reason for her discharge, Ms. Thomas stated that she gave false information about a fee that the Employer charges for processing payments. Ms. Thomas stated that this violated Section 803 of the *Fair Debt Collection Procedures Act* ["FDCPA"]. (R. Vol. 2, p. 27). This section prohibits a collector from using false or misleading information or representations. She also explained that Ms. Westbrook violated the Employer's company policy as found in its handbook, which would result in immediate termination. (R. Vol. 2, p. 27-28). Ms. Westbrook signed for the handbook on September 13, 2010.

Ms. Thomas further explained that the incident occurred on July 26, 2011. She learned of it through notification from the monitoring department. Regarding monitoring, she explained that she is notified if a collector says something improper. (R. Vol. 2, p. 28-29).

Ms. Thomas stated that she was notified on the day of the occurrence when she received an email that described what happened. After getting the email, she reviewed and the collection manager, Taurse Harden, reviewed the call. (R. Vol. 2, p. 30). She heard Ms. Westbrook say that the processing fee was interest on the account. (R. Vol. 2, p. 31).

Ms. Thomas explained that the Employer does not charge interest. The \$15.00 fee that Ms. Westbrook referred to was actually a payment processing fee. Ms. Thomas further stated that the word "interest" should never be used in a collection call. (R. Vol. 2, p. 31).

After the incident, Ms. Westbrook was immediately discharged. She told Ms. Westbrook why she was being fired. At the time that she discharged her, she asked her about making the statement. Ms. Westbrook stated that she did not realize that she had called the \$15.00 processing fee an interest charge. During her testimony, Ms. Thomas did not state that there had been any other similar incidents by Ms. Westbrook. She also did not indicate that Ms. Westbrook had been previously warned for any policy or FDCPA violations.

Ms. Angelica Westbrook testified next. (R. Vol. 2, p. 33). She verified her dates of employment. (R. Vol. 2, p. 34). Regarding her discharge, she stated that Ms. Thomas called her into a room with Mr. Harden. The first statement made to her was that she was being discharged. She was told that it was because she told a customer or debtor that a \$15.00 processing charge was an interest fee. (R. Vol. 2, p. 34). She denied doing so at the time; and said that if she did, she did not remember doing so. (R. Vol. 2, p. 34).

Ms. Westbrook acknowledged that she was aware of company policy. She confirmed that she was trained on making calls. She stated that she has never said the Employer charged an interest fee. She again stated that if she did on the occasion in question, she did not remember it. She also said the Employer did not let her listen to the phone call. (R. Vol. 2, p. 35-36).

When questioned further about the phone call, Ms. Westbrook explained that Mr. Harden said a lady called and asked a question about a payment. Ms. Westbrook told the lady there was a \$15.00 fee. Ms. Westbrook stated that she has always called the \$15.00 charge a "convenience fee." She has never used interest fee, nor has she known about one charged by the Employer. (R. Vol. 2, p. 36). She again stated the \$15.00 fee is a convenience fee or a payment processing fee, meaning that the Employer charges \$15.00 for the debtor to make a payment by credit card. (R. Vol. 2, p. 36).

At the conclusion of Ms. Westbrook's testimony, both Ms. Thomas and Ms. Westbrook were given the opportunity to make closing statements. However, neither chose to make a closing statement.

Case Authorities and Argument

The Mississippi Supreme Court adopted a general definition of “misconduct” in Unemployment Insurance cases in Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982). This definition provides in pertinent part as follows, to-wit:

“The meaning of the term ‘misconduct’, as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer’s interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees....Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered ‘misconduct’ within the meaning of the Statute.”

Id. at 1381. In applying this definition the courts have also held that the Employer’s burden of proving misconduct is by clear and convincing substantial evidence. Brandon v. Mississippi Employment Security Comm’n, 768 So. 2d 341 (Miss. 2000). Typically to support a finding of misconduct, the Employer must establish that the employee deliberately or willfully and wantonly violated a rule or policy, or prohibited conduct. Mississippi Employment Security Comm’n v. Woods, 938 So. 2d 359 (Miss. Ct. App. 2006). *See* Shannon Engineering v. Mississippi Employment Sec. Comm’n, 549 So. 2d 446 (Miss. 1989)(refusal to sign a Alabor department@ document requested by the employer was not misconduct); Brandon v. Mississippi Employment Security Comm’n, 768 So. 2d 341 (Miss. 2000)(assisting a hospital patient with completing an absentee ballot was permissible, and did not violate hospital’s prohibition against solicitation); Campbell v. Mississippi Employment Sec. Comm’n, 782 So. 2d 751 (Miss. Ct. App. 2000)(secretly recording conference with employer was not misconduct so as to preclude receiving unemployment benefits).

Based upon the testimony, at worst, Ms. Westbrook's actions were an isolated incident of ordinary negligence, or an inadvertent mistake. In that regard, perhaps she did make a mistake and actually did call the service fee an interest charge. However, an isolated statement that is a one-time mistake certainly should not be characterized as a falsehood. *See Kemper County School District v. Mississippi Employment Security Commission*, 832 So. 2d 548 (Miss. 2002)(ordinary negligence is not typically sufficient to establish misconduct). Further, although the burden of complying with the FDCPA requires vigilance by the Employer, the Employer did not thoroughly investigate the matter before determining that Ms. Westbrook acted in a willful and wanton manner, and discharge her. There was no indication that her other conversations were reviewed before firing her. No other employees were interviewed. Thus, the Employer's proof as to whether she deliberately misrepresented a fact, or acted with willful and wanton disregard of the Employer's interest, was insufficient.

Counsel for the Employer argues that it made sense for the Employer to conclude that Ms. Westbrook deliberately called the processing fee an interest charge. Counsel argues that collectors avoid telling debtors that the \$15.00 fee is for processing a credit card payment to get debtors to make immediate payment. However, it also does not make sense that an interest charge would be a flat, even \$15.00. Too, collectors usually encourage and motivate a debtor to make an immediate credit card payment by often substantially compromising and reducing the amount owed, such that a \$15.00 processing fee, *i.e.* a rather small fee, certainly should not be a concern to a debtor.

In *Brandon v. Mississippi Employment Security Comm'n*, 768 So. 2d 341 (Miss. 2000), Ms. Brandon was employee of Baptist Memorial Hospital-Golden Triangle. She was discharged for violating the employer's rule prohibiting solicitation of patients, when she assisted two patients with completing absentee ballots. The Court held that the employer failed to prove misconduct,

because it was not clear that Ms. Brandon's actions were "solicitation" of patients. Id. at 345-46.

In so holding, the Court stated:

Here, we cannot clearly say that Brandon's actions were more than an error in judgment. She stated that she was not aware that what she was doing amounted to a solicitation. We are not insinuating that Brandon was free and clear of any fault here in not verifying with her employer that the conduct was proper.... However, we are not convinced that her actions constituted actual solicitation as were are given no clear, substantial evidence on which to base this theory. A mere error in judgment will not suffice as misconduct for the purposes of denial of compensation.

Id. at 345-46.

Likewise, in this case, contrary to the Employer's argument, it is not clear that Ms. Westbrook's statement was a falsehood. The Employer has also failed to produce any transcripts or actual recordings of the alleged conversations. No convincing proof has been provided to MDES to conclude that Ms. Westbrook deliberately violated the Employer's policy and lied. In that regard, it is certainly the Employer's prerogative and right to terminate Ms. Westbrook, but that termination does not necessarily translate or equivocate to misconduct.

Counsel also argues that the ALJ's decision was arbitrary and capricious, because the decision allegedly does not give a clear reason for finding the Employer failed to prove misconduct. Counsel incredibly argues further that neither he nor the Employer know, or can tell, the reason they did not prove misconduct. Counsel makes this argument even though the Circuit Court had no problem discerning the ALJ's reasoning and conclusion.

In that regard, the ALJ in her Fact Findings states the reason for the discharge. Further, the Fact Findings state the Employer believed that Ms. Westbrook deliberately misrepresented the processing fee as an interest charge. Conversely, the decision states that the Claimant did not believe she referred to the fee as interest. (R. Vol. 2, p. 41-43). Thus, the ALJ sets out the

conflicting testimony, and concludes that based on the testimony the Employer failed to prove the Claimant deliberately, or willfully and wantonly, gave false or misleading information.

Counsel for the Employer also cites a PERS case that is not analogous to this unemployment benefits case. (Employer's Brief, p. 12). The PERS case involves whether a State employee was permanently mentally or physically disabled, and thus unable to perform her job. This decision is significantly different, because there apparently were no facts set out in the Hearing Officer's Order. Further, a mental or physical disability typically requires medical expert proof. However, there is no discussion or statement as to conflicting proof, or as to any medical proof, or why the proof was insufficient. So the PERS Order is apparently defective and inadequate on its face.

Conversely, in this case, the ALJ's decision sets out the essential facts, indicating the conflicting testimony. Further, the ALJ does inform the parties and readers that the ALJ concluded the Employer failed to prove that the Claimant deliberately, or willfully and wantonly, referred to the processing fee as an interest charge. This does not reflect an arbitrary or capricious decision, but a well thought out decision by the ALJ. Further, from reading counsel for the Employer's Brief, it appears he had no difficulty in understanding the ALJ's Reasoning and Conclusion, and again the Circuit Court did not!

Lastly, counsel for the Employer argues that the ALJ's decision is contrary to the overwhelming weight of the evidence, and was implausible. In making this argument, counsel is essentially representing to this Honorable Court that reasonable minds could not differ on the testimony, and the Employer proved misconduct as a matter-of-law. In making this argument, counsel must ignore that the testimony is, in fact, conflicting as to whether the word "interest" was actually spoken by Ms. Westbrook, or deliberately spoken by her as a falsehood. Counsel must

also represent that Employer proved the alleged misconduct clear and convincing substantial evidence; and in so doing, counsel must also disregard the proof that the Employer could have provided that would have established what Ms. Westbrook said, and the manner in which she said it. i.e. the audio tape, or even a transcript of it. Contrary to counsel's argument, Ms. Westbrook in her testimony doubts and sufficiently controverts that she called the fee "interest." Thus, reasonable minds could differ, and the ALJ rightfully concludes that the Employer failed to prove Ms. Westbrook deliberately called the fee "interest," and deliberately or willfully and wantonly violated the Employer's policy prohibiting it.

Further, counsel argued that Ms. Westbrook could have produced the audio tape at the hearing. However, Ms. Westbrook was under no obligation to do so; and Employer had the burden of proof by clear and convincing substantial evidence, not Ms. Westbrook. Further, the testimony reflected that the Employer refused to let Ms. Westbrook listen to the tape recording, and did not provide her a transcript of it.

Miss. Dept. of Employment Sec. v. Clark, 13 So. 3d 866 (Miss. Ct. App. 2009) cited by counsel also differed from the facts of the instant case. In Clark, the Claimant was told by the Employer that it would not give him a copy of the drug/alcohol test if he signed a medical release, or he could get it from the clinic, an independent third party. Further, there was substantial testimony as to Mr. Clark's physical condition bolstering the Employer witness' testimony as to the test results, such there was substantial evidence of misconduct without being part of the record.

Further, the Clark Court did not base its decision on Mr. Clark's failure to obtain or produce the test report, but merely commented that he could have done so. The Court found that there was substantial testimony to support the Board of Review's decision without the test report, noting that perhaps Mr. Clark could have refuted that by producing the report; and his failure to do

so may perhaps be construed against him. Here, the testimony was simply “he said, she said;” and conflicting, and the Employer could have easily produced the audio tape or a transcript, which was not a medical record perhaps requiring confidentiality by the Employer, as in the Clark case.

The case of analogously in Woodland Vill. Nursing Ctr., LLC v. Miss. Dept of Employment Sec., 138 So. 3d 946 (Miss. Ct. App. 2013) is instructive on the Employer’s failure to meet its burden of proof.

In Woodland Village Nursing, the Claimant, a nursing home employee, failed to follow the employer’s policy that the Rosary must be recited to a patient. Discussing the Employer’s burden of proof, the Court of Appeals held that the employer failed to meet its burden of proof, when the employer failed to produce evidence that the employee knew she would be immediately discharged for refusing to recite the Rosary. Id. at 951-952.

Likewise, in this case, while Ms. Westbrook states that she was generally aware of the policy prohibiting referring to the \$15.00 as interest, the Employer’s failed to produce the policy providing for immediate termination for making such an utterance. The Employer also fails to provide the audio tape or a transcript that would have conclusively proved that she called the convenience fee “interest,” and the context or manner in which she did so, *i.e.* whether it appeared to be a mistake or deliberate. The Employer certainly should have known to do so at the hearing, since when terminated by Ms. Thomas, Ms. Westbrook denied making such a statement. (R. Vol. 2 p. 32-33). Further, since the Employer did not produce a copy of its policy, it is unclear as to whether Ms. Westbrook should have been progressively disciplined under the policy for this first time incident, rather than immediately terminated. There is no evidence provided by the Employer that she had ever done so previously.

CONCLUSION

In closing, the testimony does not support a finding that the Employer proved misconduct by clear and convincing, or simply substantial, evidence due Ms. Westbrook making a false statement to a debtor during a collection phone call. Further, the testimony establishes that, at worst, Claimant's action on the occasion in question was an isolated incident of ordinary negligence; and thus, not misconduct. Further, it is apparent that in immediately discharging Claimant, the Employer failed to determine that Claimant's actions were a willful and wanton disregard of the Employer's reasonable behavior standards.

Since there are sufficient facts in the record, under the case authorities, to support the Board of Review's decision, the Employer failed to establish that the ALJ or Board of Review acted arbitrarily and capriciously in rendering its decision. Further, the proof was insufficient to establish that her actions were a lie, or even a willful and wanton violation of the Employer's policy and interest. Thus, based on the case authorities cited above, and testimony, the Circuit Court and Board of Review decisions finding that the Employer failed to meet its burden of proving misconduct should be affirmed.

RESPECTFULLY SUBMITTED, this the 7th day of April, 2015.

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

By: /s/ Albert Bozeman White
ALBERT BOZEMAN WHITE
ASSISTANT GENERAL COUNSEL

OF COUNSEL:
ALBERT BOZEMAN WHITE
ASSISTANT GENERAL COUNSEL
MSB No. 7132
Post Office Box 1699
Jackson, MS 39215-1699

CERTIFICATE OF SERVICE

I, Albert Bozeman White, Attorney for Appellant, Mississippi Department of Employment Security, do hereby certify that I have this day electronically filed the foregoing pleading with the Clerk of the Court using the MEC system, with a copy being mailed, postage prepaid, to the following:

Ms. Angelica Westbrook
140 Andrews Street
Shannon, MS 38868

Honorable Jim S. Pounds
Circuit Court Judge, District 1
Post Office Box 316
Booneville, MS 38829-0316

THIS, the 7th day of April, 2015.

/s/ Albert Bozeman White
ALBERT BOZEMAN WHITE