MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

P.O. Box 1699

Jackson, Mississippi 39215-1699

Docket No. 179711

LARA E GILL
259 MELROSE DR
JACKSON MS 39211-4321

DEBRA JOHNSON
CITY OF JACKSON
PO BOX 17
JACKSON MS 39205-0017

Office of
Administrative Hearings And Appeals

ADMINISTRATIVE LAW JUDGE DECISION

SERVICE INFORMATION:

A true and accurate copy of this decision was mailed to each of the parties listed.

EXHIBIT
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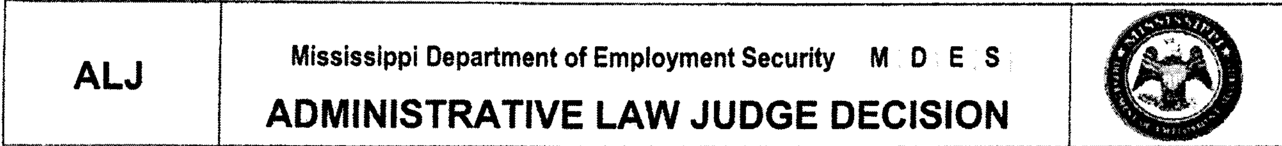

ALJ | Mississippi Department of Employment Security M D E S

ADMINISTRATIVE LAW JUDGE DECISION

Date Mailed: 04/17/2015

Docket Number: 179711

PARTIES INVOLVED

APPELLANT

Claimant SSN: ***-**-3648

LARA E GILL
259 MELROSE DR
JACKSON MS 39211-4321

OPPONENT

MDES EAN: 89-00044-0-00

CITY OF JACKSON
PO BOX 17
JACKSON MS 39205-0017

CASE HISTORY

The claimant timely appealed a determination of the Mississippi Department of Employment Security which concluded that the claimant was discharged for misconduct connected with the work.

A telephonic hearing before the Administrative Law Judge was held on 04/07/2015 at which the claimant, her attorney, an employer representative, and an employer witness participated.

ISSUE

The issues to be considered in this case are whether the claimant is entitled to benefits based on the reason for separation from employment, and whether the employer must reimburse the fund for any charges that cannot be non-charged.

FINDINGS OF FACT

Based on the testimony and certain documents admitted into evidence, the Administrative Law Judge finds:

The claimant worked for about six years as a Deputy City Attorney for the employer, the City of Jackson, in Jackson, Mississippi ending December 16, 2014 when the claimant was discharged.

The context of the events resulting in the claimant's discharge was the claimant's transfer from the city litigation department to the city prosecutor's office. The claimant was very unhappy with the prospect of this transfer and objected to it in writing, asking for either reconsideration or an alternative transfer, which were denied. The claimant began her new assignment in due course.

The employer witness (EW) gave five reasons for the claimant's discharge.

1.) The EW stated a certain notebook containing materials related to a case the claimant had worked on was found in boxes being packed up by the claimant. The notebook had been sought and not found elsewhere, and it was alleged to be inappropriate for the claimant to remove it.

The claimant stated the notebook had copies of materials used for a case in which she had won an injunction. The case dealt with prosecution of protestors, and the claimant expected to continue to be dealing with the case after her move to the city prosecutor's office.

2.) The EW stated it was discovered that after an afternoon spent packing her office on November 25, 2014, it was discovered that the claimant had deleted a number of directories from the shared "G drive" used by all department attorneys for storing files. Included in these deletions, the EW alleged the claimant had deleted files in a directory with the ER's name on it.

The claimant denied deleting any files in a directory with the ER's name on it. She admitted deleting files from the G drive, but only as a process of cleaning up and removing old and obsolete files she had dealt with in the past. She stated her basis for doing this was instructions in a letter she received (see, Claimant's Exhibit 1, page 15, memorandum dated November 17, 2014) to: "Please

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ensure that all computers and other necessary equipment is transferred and properly updated such that we will have a smooth transition." The claimant's desk computer was not being transferred to her new assignment with the prosecutor, nor would she access the subject G drive from her new assignment.

All deleted files were recovered by the employer both through its IT department's recovery and because they were on a zip drive subsequently returned by the claimant. The nature of the deleted files were discussed to some extent at the hearing. It was not alleged the files deleted were related to pending litigation or other pending matters.

3.) The EW stated that it was discovered on November 24 that the claimant had, in 2013, done outside work for a law firm that also represented Hinds County, an entity the City of Jackson was often in conflict with, that this work might represent a confli

The claimant stated that at the time of the work, the city attorney was the person she was doing the work for (Pieter Teeuwissen) and she had his approval and that the current city attorney knew the claimant continued to do some side work for Teeuwissen in his private practice, which work had nothing to do with Hinds county or city business. The claimant stated that almost all city attorneys supplemented their income with private legal work and there was no formal or written process of approval in practice. The EW stated it was improper for any private document to be stored on a city computer. The EW suggested the claimant must have been working on city time, but the claimant denied this.

4.) The EW alleged that on November 26, 2014, the claimant was observing a court proceeding in her new role in the prosecutor's office and left without clocking out, giving the impression she was still at work though no one knew where she was.

The claimant stated she stayed in court having conversations with the judges in chambers and left about 1pm, as all the other city prosecutor did. She did not clock out because in her first day at the new office she both forgot and was not familiar with the location of the timekeeping device.

5.) The EW alleged the claimant did not return a zip drive when requested. The claimant stated the zip drive was at her home and she returned it the next day.

The claimant was discharged on December 16, 2014 (see, Claimant's Exhibit 1, page 72) immediately after a pre-termination hearing.

The claimant and employer both submitted numerous documents purportedly supporting their claims. These were accepted collectively as Claimant's Exhibit 1, and Employer's Exhibit 1 to the hearing.

REASONING AND CONCLUSION

The City of Jackson (MDES EAN 89-00044-0-00) is a political subdivision that has elected, under the Mississippi Employment Security Law, to pay a tax rate of 0.25% and be non-charged as regular rate-paying private sector employers are non-charged, while reimbursing the fund for any charges that cannot be non-charged.

Section 71-5-513 A (1) (b) of the Mississippi Employment Security Law provides that an individual shall be disqualified for benefits if he was discharged for misconduct connected with the work.

Section 71-5-513 A (1) (c) of the Mississippi Employment Security Law provides that the burden of proof to establish misconduct shall be on the employer.

In the case of Shannon Engineering and Construction, Inc. v. The Mississippi Employment Security Commission and Reginald Berry, 549 So.2d 446, 450 (Miss. 1989), the Mississippi Supreme Court held that an employer must provide substantial, clear and convincing evidence of misconduct.

Mississippi Department of Employment Security Regulation 308.00 "Misconduct Defined" states: "A. For purposes of Mississippi Code Section 71-5-513, misconduct shall be defined as including but not limited to: 1. The failure to obey orders, rules or instructions, or failure to discharge the duties for which an individual was employed; a. An individual shall be found guilty of

employee misconduct for the violation of an employer rule only under the following conditions: i. the employee knew or should have known of the rule; ii. the rule was lawful and reasonably related to the job environment and performance; and iii. the rule is fairly and consistently enforced. 2. A substantial disregard of the employer's interests or of the employee's duties and obligations to the employer; 3. Conduct which shows intentional disregard, or if not intentional disregard, utter indifference, of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of the employee; or 4. Carelessness or negligence of such degree or recurrence as to demonstrate wrongful intent. However, mere inefficiency, unsatisfactory conduct, failure to perform as the result of inability or incapacity, a good faith error in judgment or discretion, or conduct mandated by a religious belief or the law is not misconduct."

In the case of Wheeler vs. Arriola, 408 So.2d 1381 (Miss. 1982), the Mississippi Supreme Court held: "The meaning of the term 'misconduct', as used in the Unemployment Compensation Statute, was 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. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an 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 the result of inability or incapacity, or inadvertencies and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the Statute."

In today's case, the employer has not provided substantial, clear and convincing evidence of misconduct for any of its five allegations. In each of these five allegations, the claimant's credible testimony and documentation was sufficient to either explain the incident entirely (allegations 1, 4 and 5, above) or render the sum of the competing evidence unclear and unconvincing as to any misconduct by the claimant (allegations 2 - the G drive - and 3 - outside work).

Furthermore, any written regulations cited by the employer would be superseded by actual practices with less formal processes than required by the regulations, for example in the case of any outside work done by the claimant. In the case of outside work, a supervisor's general knowledge without objection of the claimant's outside work would sufficiently waive any requirement of a written application to the supervisor. The claimant gave credible testimony along these lines sufficient to deflect the allegation that she was in willful violation of certain city regulations cited by the employer.

Finally, if the claimant's "clean up" of the G drive was in poor judgment and a better course would have been to leave the old materials alone, merely poor judgment is excepted from the definition of misconduct. It was not shown or even alleged that the claimant acted in anger, attempting to sabotage departmental efforts or delete materials related to pending matters. If the claimant was negligent in her interpretation of the instruction to "ensure that all computers and other necessary equipment is transferred and properly updated," her negligence was not of such degree or recurrence as to demonstrate wrongful intent.

In sum, the employer was unable to establish by substantial, clear and convincing evidence that the claimant committed any act or omission constituting misconduct.

Consequently, the decision of the claims adjudicator was in error, and is hereby reversed.

DECISION

Reversed. If otherwise eligible, the claimant is entitled to the receipt of benefits based on the manner of the job separation. The employer is required to reimburse its proportionate share of benefits which may be paid to the claimant based on this issue.

Mississippi Department of Employment Security is an equal opportunity employer.
Auxiliary aids and services are available upon request to individuals with disabilities.

Date Mailed: 04/17/2015

Docket Number: 179711

Dated and mailed on 04/17/2015.

Bryan P Lieb
Administrative Law Judge

APPEAL RIGHTS

This decision will become final on **05/01/2015**, which is fourteen (14) calendar days from the date this decision was mailed, unless you file an appeal with the Board of Review and/or request a rehearing of the case by **05/01/2015**. If you failed to appear at the initial hearing you should include the reasons you failed to attend. The Administrative Law Judge and/or the Board of Review may determine if good cause exists to grant any rehearing request. An appeal and rehearing request may be filed using one of the following methods:

Online: **Visit www.mdes.ms.gov**
Phone: 601-321-6503 or 1-866-633-7041
FAX: 601-321-6238 or 1-877-994-6329
Mail: MDES Board of Review, PO Box 1699, Jackson MS 39215-1699

When an appeal is filed to the Board of Review, it will be considered on the record previously made and no hearing before the Board will be scheduled.

Claimant Instructions: Should an appeal be filed and you remain unemployed, you should continue to file weekly certifications until you receive a decision from the Board. In the event the Board finds in your favor, benefits will be paid only for those weeks that are filed, if otherwise eligible.