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

**NO. 2009-CC-01203-COA**

**MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND TINA L. DARBY** — **APPELLANTS**

**v.**

**TRENT L. HOWELL, PLLC** — **APPELLEE**

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| DATE OF JUDGMENT: | 03/23/2009 |
| TRIAL JUDGE: | HON. ANDREW C. BAKER |
| COURT FROM WHICH APPEALED: | YALOBUSHA COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANTS: | LEANNE FRANKLIN BRADY |
| ATTORNEY FOR APPELLEE: | TRENT L. HOWELL |
| NATURE OF THE CASE: | CIVIL - OTHER |
| TRIAL COURT DISPOSITION: | REVERSED BOARD OF REVIEW'S DECISION TO AWARD UNEMPLOYMENT BENEFITS TO TINA L. DARBY |
| DISPOSITION: | REVERSED AND RENDERED: 10/19/2010 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**GRIFFIS, J., FOR THE COURT**:

¶1. Mississippi Department of Employment Security (MDES) and Tina L. Darby appeal the order of the Circuit Court of Yalobusha County, which reversed a decision of the MDES Board of Review. The Board of Review ruled that Darby had voluntarily quit her job for good cause and was, therefore, entitled to unemployment benefits. On appeal, the circuit court reversed the decision of the Board of Review holding that the Board of Review failed

to consider all of the evidence and that its decision was not based on substantial evidence.

FACTS

¶2. Trent L. Howell, PLLC (the firm) is a law office located in Water Valley, Mississippi. Trent Howell (Trent) and his wife, Shelley, work at the firm. The only other employee during the time giving rise to this appeal was Darby. Darby first began working as a legal assistant for the firm when she was eighteen years old, and she stayed with the firm until she was twenty-nine years old. Over time, an "office flirtation" developed between Trent and Darby. In fact, Trent wrote Darby a letter expressing his feelings toward her. Offended by Trent's letter, Darby was ready and willing to quit her job, but after meeting with Trent and his wife (collectively, the Howells) and receiving an apology from Trent, Darby decided to stay.

¶3. Following the meeting between the Howells and Darby, three occurrences took place that Darby claimed to be harassment: a phone call to her dentist, an uninvited visit to Darby's house, and a phone call to her beautician. She claims these occurrences ultimately forced her to quit her job. Each of these occurrences took place within two months of the reconciliation meeting between the parties.

¶4. The first phone call that Darby complains of was made by Trent to Darby's dentist. Trent claimed that he was searching for Darby because she had failed to pick up some files from work. The uninvited visit by Trent to Darby's house was made in order to retrieve files that Darby had failed to turn in to the chancery clerk's office – a duty that Darby normally undertook. The second phone call placed by Trent was made to Darby's beautician. Trent placed this call after seeing a car similar to Darby's outside of the parlor and after Darby had

called into work because she was sick. It was after learning about this second phone call that Darby decided to leave her employment with the firm.

¶5. In October 2007, after voluntarily leaving her position at the firm, Darby filed for unemployment benefits. An investigation was conducted by MDES to determine Darby's eligibility. After speaking with both interested parties, the claims examiner recommended disqualification of unemployment benefits because Darby had failed to show good cause for voluntarily leaving her employment.

¶6. Darby appealed the decision of the claims examiner, and after a telephonic hearing before the administrative judge, Darby was denied benefits once again. After listening to Darby, Trent, and witnesses for both parties, the administrative judge found that Darby had failed to prove that she had left her employment for good cause, and the administrative judge affirmed the decision of the claims examiner. Following this decision, Darby filed an appeal to the Board of Review.

¶7. The Board of Review agreed with and adopted the administrative judge's findings of fact; however, the Board of Review also made additional findings that allowed Darby to qualify for benefits. The Board of Review found that Trent's conduct following the reconciliation meeting between the parties constituted a form of harassment which created an offensive work environment. Thus, the Board of Review was of the opinion that Darby had good cause for quitting her employment.

¶8. The firm appealed the Board of Review's decision to the circuit court. After reviewing the record and briefs submitted by both parties, the circuit court reversed the decision of the Board of Review. The circuit court found that, after the reconciliation

meeting between Darby and the Howells, the record failed to show how Trent's behavior toward Darby had created an offensive work environment. The circuit court found that the decision of the Board of Review was not supported by substantial evidence; thus, the circuit court reinstated the decision of the administrative judge.

STANDARD OF REVIEW

¶9. "An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights." *Maxwell v. Miss. Employment Sec. Comm'n*, 792 So. 2d 1031, 1032 (¶7) (Miss. Ct. App. 2001). Upon judicial review, "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." Miss. Code Ann. § 71-5-531 (Supp. 2009).

¶10. "Substantial evidence" is that which is relevant and capable of supporting a reasonable conclusion, or more than a mere scintilla of evidence. *Gilbreath v. Miss. Employment Sec. Comm'n*, 910 So. 2d 682, 686 (¶13) (Miss. Ct. App. 2005). In addition, "[a] rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise." *Allen v. Miss. Employment Sec. Comm'n*, 639 So. 2d 904, 906 (Miss. 1994).

¶11. A circuit court serves as a reviewing court in appeals from administrative agencies. *Walters v. Miss. Dep't of Econ. and Cmty. Dev.*, 768 So. 2d 893, 895 (¶8) (Miss. 2000). Therefore, its scope of review is restricted to the findings of the agency. *Id*. In review of an agency's decision the circuit court is not serving as an initial fact-finder, but rather as an

intermediate appellate court. *Bd. of Law Enforcement Officer Standards and Training v. Butler*, 672 So. 2d 1196, 1199 (Miss. 1996). As a result, decisions of the lower court are not due the same deference as if it were sitting as a trial court. *Id*. When an administrative agency's decision is based on substantial evidence, then its ruling is binding upon any appellate court, such as, the circuit court and this Court. *Wilkinson County Bd. Of Supervisors v. Quality Farms, Inc*., 767 So. 2d 1007, 1010 (¶9) (Miss. 2000).

ANALYSIS

¶12. MDES and Darby first argue that the circuit court erred when it found the Board of Review's decision was not supported by substantial evidence. The Board of Review considered the evidence presented. The Board of Review was solely responsible for evaluating the credibility of the testimony and the supporting documentation. Because the Board of Review based its findings on the evidentiary record, we find that the circuit court was outside its scope of authority when it reweighed the evidence of the case.

¶13. The issue here was whether Darby left her employment with Trent's law firm because he had created an offensive work environment by sexually harassing her. The Board of Review made several factual findings. First, Trent wanted a personal relationship with Darby. Second, Trent wanted a sexual relationship with Darby. Third, Trent interfered with Darby's personal life and affairs by (a) telling her not to marry her fiancé, (b) questioning her whereabouts during her personal time, and (c) meddling in Darby's personal affairs or appointments.

¶14. The circuit judge reviewed the facts and determined that the firm was not liable for creating an offensive work environment for Darby. The circuit judge concluded that a mere

"office flirtation" existed between Trent and Darby. Specifically, the circuit judge utilized Trent's testimony as his primary basis to conclude that an office flirtation existed between Trent and Darby. Darby testified she did not flirt with Trent at any time during her employment. In fact, Darby testified that she communicated to Trent that she was not interested in a romantic or sexual relationship with him. Furthermore, Darby told Trent she would find another job if he did not stop his romantic advances toward her.

¶15. The Board of Review found Trent's love letter to Darby was substantial evidence for her claim. Trent's self-authored letter supported the following conduct: (1) he propositioned Darby for sex; (2) he propositioned Darby for a romantic relationship; (3) he questioned Darby's whereabouts and activities that were not work related; and (4) he admitted that he knew his feelings for Darby were his personal problem. The Board of Review indicated that Trent's love letter led to the reasonable conclusion that Trent was sexually harassing Darby.

¶16. Since the Board of Review held this evidence to be substantial, the standard of review for appellate review of an agency's decision dictates that the circuit court cannot reevaluate the testimony and documentation deemed as the basis of the Board of Review's findings in this case. *Walters*, 768 So. 2d at 895 (¶8).

¶17. The circuit judge disagreed with the Board of Review's finding that Trent had consistently meddled and interfered in Darby's personal life and affairs. Again, the record points to specific instances in which Trent's conduct would have been reasonably offensive to Darby's ability to continue work.

¶18. Trent stepped outside his scope as Darby's employer and began to interfere in her personal life. He testified that when he came to Darby's home he questioned and criticized

her relationship with Mike Hill, her fiancé. Trent testified he still believes Hill was not the right man for Darby. Further, Trent admitted he had called Darby's hairdresser and dentist to verify her whereabouts when she took personal time off of work. In addition, Hill provided evidence that Trent meddled and interfered in Darby's personal life. Hill testified that he witnessed Trent's altercation with Darby at her home. The record contains substantial evidence to support the Board of Review's finding.

¶19. Because the Board of Review is the ultimate fact-finder in unemployment-compensation cases, the circuit court was acting outside his scope of authority by reweighing the facts. *Butler*, 672 So. 2d at 1199.

¶20. The dissent cites the appropriate standard of review. However, the dissent does not follow the authority cited. Indeed, the dissent fails to consider the Board of Review as the ultimate finder of fact and does not give the appropriate deference to the Board of Review's findings. It matters not what the circuit court judge found; instead, we must review the Board of Review's findings.

¶21. We conclude that the circuit court improperly applied the three-prong test from *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323 (S.D. Miss.1986), a federal court decision, to determine whether there was substantial evidence to support why Darby had voluntarily left her employment. The circuit court should have used the test defined by the Mississippi Supreme Court in *Hoerner Boxes, Inc. v. Mississippi Employment Security Commission*, 693 So. 2d 1343, 1348 (Miss. 1997). There, the supreme court defined the type of offensive behavior or work environment that a claimant would need to experience for his or her claim to be valid for unemployment compensation benefits. *Id* at 1347. An employee who is

sexually harassed within the workplace is entitled to unemployment-compensation if "an ordinary prudent employee would leave the ranks of the employed for the unemployed" because of a specific degree of harassment. *Id* at 1348. The Mississippi Supreme Court has held sexual harassment in the workplace as a valid reason for an employee to voluntarily terminate his or her employment under the statutory guidelines of Mississippi Code Annotated section 71-5-513 (A)(3)(a) (Supp. 2009).

¶22. In *Hoerner Boxes,* the claimant left her job because she was constantly sexually harassed by a co-worker. *Hoerner Boxes, Inc.*, 693 So. 2d at 1348. The claimant did not initiate, participate, or encourage any sexual advances from her co-worker. *Id*. at 1347. Also, she did not have a questionable or personal relationship with any co-worker or supervisor from the company. *Id.*

¶23. The supreme court applied the following test to evaluate whether substantial evidence supported that Board of Review's decision: (1) was there a hostile work environment that a reasonable person in the same situation would be unable to perform his or her job, and eventually leave his or her and job and (2) was there any conduct by the plaintiff in which she participated or contributed to the sexual overtones and harassment encountered that would make the treatment received unhostile. *Id*.

¶24. In contrast, *Loftin-Boggs* involved a claimant who had contributed to the sexual harassment among co-workers in her office. *Loftin-Boggs*, 633 F. Supp. at 1324. The plaintiff admitted that she had used profanity, initiated sexually related discussions with co-workers during work hours, and participated in a questionable relationship with a supervisor. *Id*. Since she clearly contributed to the sexual nature of the workplace, the federal court held

that she had failed to prove she was sexually harassed to such a nature that she was forced to leave her position. *Id* at 1328. The following three-prong test was established: (1) submission to sexual favors or advances was explicitly or implicitly a condition of employment, (2) submission to or rejection of advances was used as a basis for employment decisions, or (3) such conduct had the purpose or effect of interfering with employment. *Id*. at 1326.

¶25. Here, the circuit court erred by using the *Loftin-Boggs* test to evaluate whether substantial evidence was present to support the Board of Review's finding. The supreme court's decision in *Hoerner Boxes* is more factually related to this case because the record contains substantial evidence to support the Board of Review's finding of an environment of harassment.

¶26. For these reasons, we reverse the judgment of the circuit court and reinstate the Board of Review's decision. Darby proved by substantial evidence that she had good cause to leave her employment with the firm due to harassment, under Mississippi Code Annotated section 71-5-513(A)(1)(c) (Supp. 2009). The circuit court's reversal of the Board of Review's decision overlooked the substantial evidence in the record that Trent's sexual harassment of Darby constituted an offensive work environment and fails to apply the correct standard to determine whether the harassment encountered was to such a degree that it qualified as valid cause to voluntarily terminate her employment.

¶27. **THE JUDGMENT OF THE CIRCUIT COURT OF YALOBUSHA COUNTY IS REVERSED, AND A JUDGMENT IS RENDERED TO REINSTATE THE DECISION OF THE MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY.**

**LEE AND MYERS, P.JJ., ROBERTS, CARLTON AND MAXWELL, JJ.,**

**CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY ISHEE, J. ISHEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J.**

**IRVING, J., DISSENTING:**

¶28. With respect, I must disagree with the majority. I would affirm the judgment of the circuit court, which reversed the decision of the Mississippi Department of Employment Security. I agree with the dissent authored by Judge Ishee. However, I write separately because it appears to me that neither the majority nor Judge Ishee's dissent gives proper weight to the singular fact that provides ample footing for the decision of the circuit court: the absence of any evidence that Trent sexually harassed Darby after August 6, 2007, the date that the Howells reconciled with Darby with respect to Trent's previous conduct toward Darby.

¶29. I want to be clear: the record contains ample evidence to justify a finding that Trent's initial actions toward Darby would have justified Darby leaving her employment with the Howells had she done so prior to their reconciling with her. I would also agree that had Trent continued his old ways after the reconciliation, it would have been proper to consider his pre-reconciliation conduct in deciding whether Darby was justified in terminating her employment when she did.

¶30. The circuit court found that the Board of Review did not consider all of the evidence. I agree. Based on the decision of the Board of Review, it could not have considered Trent's post-reconciliation conduct toward Darby, as his post-reconciliation conduct toward Darby does not provide a justifiable basis for Darby terminating her employment, notwithstanding

the fact that his pre-reconciliation conduct did. Three incidents between Trent and Darby occurred after the reconciliation between Darby and the Howells, and it is these incidents upon which Darby bases her case that she was justified in terminating her employment with the Howells. Regarding these incidents, the record reveals the following facts adduced during the hearing before the administrative judge, who found that Darby had terminated her employment without justification.

¶31. On August 9, 2007, Trent called Darby's dentist, who was also a personal friend of Trent's, and asked if Darby had kept her dental appointment that day. According to Trent's testimony, Darby was to return to the office to pick up a file. The file pertained to title work Darby was to complete in Batesville, Mississippi, first thing the next day. Darby never returned to the office to pick up the file following her appointment, nor did she call the office to tell Trent where she was.

¶32. On September 14, 2007, Trent came to Darby's home to retrieve commitment papers related to a lunacy case. According to Trent's testimony, Darby handled commitment proceedings for the office. Darby was scheduled to appear in court that day but did not appear. Shelley attempted to contact Darby, but when she could not reach her, Shelley contacted Trent. Trent agreed to stop by Darby's home on his way back to the office to see if she was home. Darby was at home with her boyfriend. According to Trent's testimony, he admonished Darby for her recent performance at work, which resulted in an argument between the two. Both Trent and Darby testified that Darby later called to apologize for arguing with Trent.

¶33. On September 28, 2007, Trent called Darby's hairdresser. Trent testified that Darby

had asked for a half-day off work on a Friday to visit her boyfriend out of town. Trent also overheard Darby say that she was going to a bar on Thursday night. On Friday morning, Darby called in sick. Trent saw a car that looked like Darby's in town that day and had heard Darby mention that she wanted to see her hairdresser before leaving town. Suspicious about the timing of her illness, Trent called Darby's hairdresser to see if she was there.

¶34. As stated, all of the events that Darby complains of occurred after the August 6, 2007, reconciliation meeting between her and the Howells. As these events, by any reasonable interpretation, do not constitute substantial evidence that Darby was justified in leaving her employment, I would affirm the judgment of the circuit court.

**ISHEE, J., JOINS THIS OPINION IN PART.**

**ISHEE, J., DISSENTING:**

¶35. With respect to the majority, I must dissent. Mississippi Department of Employment Security (MDES) and Darby first argue that the Yalobusha County Circuit Court erred when it found the Board of Review's decision was not supported by substantial evidence. Respectfully, I disagree. The circuit court, *along with the claims examiner and the administrative judge* (AJ), found that Trent Howell's conduct never created an offensive work environment after the reconciliation meeting between Darby and Trent and his wife (collectively, the Howells).

¶36. The circuit court was of the opinion that the MDES Board of Review had totally failed to consider the totality of the evidence contained in the record. The circuit court noted a fair and unbiased reading of the record revealed that the Board of Review had considered only the part of the record favorable to Darby.

¶37. The majority alleges that, because the Board of Review is the ultimate fact-finder, the circuit court was acting outside the scope of its authority. I disagree. Although it is true that the Board of Review's decision is binding on the circuit court *when supported by substantial evidence*, the circuit court is allowed to find the ruling as being arbitrary or capricious. If the circuit court believes the ruling of the Board is unsupported by substantial evidence, the court most certainly has the authority to overturn the decision. Similarly, if this Court finds the circuit court's ruling was unsupported by substantial evidence, we have the authority to overturn its decision.

¶38. The majority takes objection with the fact that the circuit judge applied a federal southern district of Mississippi case in reviewing the decision of the Board of Review. The circuit judge applied the three-prong test from *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 1326 (S.D. Miss. 1986). In *Loftin-Boggs*, the federal district court stated sexual harassment includes unwelcome sexual advances, request for sexual favors, and other verbal and physical conduct of a sexual nature when (1) submission to such conduct is made a condition of continued employment; (2) submission to or rejection of such conduct is used as the basis for employment decision affecting the employee; or (3) such conduct has as its purpose or effect the creation of an offensive work environment. *Id.*

¶39. The majority is of the opinion that, had the circuit judge used the test applied in *Hoerner Boxes, Inc. v. Mississippi Employment Security Commission*, 693 So. 2d 1343, 1348 (Miss. 1997), a different result would have been reached. I disagree. The Mississippi Supreme Court's test in *Hoerner-Boxes* for evaluating whether or not there was substantial evidence in support of the Board of Review's decision includes: (1) was there a hostile work

environment which a reasonable person in the same situation would be unable to perform his or her job, and eventually leave his or her job and (2) was there any conduct by the plaintiff in which she participated or contributed to the sexual overtones and harassment encountered which would make the treatment received unhostile.

¶40. The circuit judge found that there was nothing in the record which reflected an affair beyond mutual flirtation between the parties; there was no request for sexual favors, no inappropriate touching, no expression of verbal terms, and no inappropriate words; therefore, no offensive work environment was created.

¶41. Furthermore, the record clearly shows, and the circuit judge duly noted, that Darby had already planned to quit her job; and she had made these plans prior to her alleged harassment. The circuit judge found that Darby had encouraged a friend to apply for her job and that Trent was a good employer. Also, the circuit judge correctly found the incidents which Darby complained of that occurred after the 2006 reconciliation meeting were precipitated by Darby and her actions as an employee.

¶42. The first phone call that Darby complains of was made by Trent to Darby's dentist. Trent claimed that he was searching for Darby because she had failed to pick up some files from work. These files were supposed to be picked up by Darby and brought to the courthouse. The uninvited visit by Trent to Darby's house was made in order to retrieve files that Darby had failed to turn in to the chancery clerk's office -- a duty that Darby normally undertook. The second phone call placed by Trent was made to Darby's beautician. Trent placed this call after seeing a car similar to Darby's outside of the parlor and after Darby had called into work because she was sick. It was after learning about this second phone call that

Darby decided to leave her employment with the firm.

¶43. Darby further claims that because this is a sexual-harassment case, it is only necessary to show that a reasonable person, under the same circumstances, would have left their employment. As noted above, the circuit judge found that there was nothing in the record which reflected an affair beyond flirtation. I agree with the circuit court which found a fair and unbiased reading of the record clearly shows the Board of Review failed to consider all of the evidence in the record; therefore, the Board of Reviews's reversal of the AJ's decision was erroneous.

¶44. Respectfully, I dissent.

**KING, C.J., JOINS THIS OPINION.**