MISSISSIPPI BAR EMPLOYMENT LAW SECTION CLE
THE COURT DID WHAT?
Mississippi Bar Center
Associate Justice Leslie D. King
May 4, 2018

Jones v. Mississippi Employment Security Commission, 181 So. 3d 1001 (2016): Jones worked the 7 p.m. shift as a product technician at T&L Specialty Company. On February 4, 2013, Jones timely reported to work. He worked until his first break at 9 p.m. During that time, Jones was informed that his girlfriend was having complications associated with her pregnancy. Appropriately concerned, Jones left work to care for his girlfriend. Prior to leaving, Jones asked a co-worker to inform their supervisor of his leaving and the reason for leaving. The co-worker failed to inform the supervisor. The employee handbook provided: "It is the employee's responsibility to notify their supervisor if the employee will be late or absent for any reason by 8 a.m. If an employee does not contact the supervisor or another company representative within 8 hrs of an absence, the company will consider that the employee has voluntarily quit and termination will take place."

When Jones timely reported to work for his next shift, he was informed that he had voluntarily quit his job and had been replaced. Jones spoke with the supervisor and a human resources representative and explained why he left and that it was not his intent to end his employment. Jones sought and was denied unemployment compensation as having " constructively voluntarily quit."

In a 3-2-3 decision, the Court held that Jones did not constructively quit and was thus entitled to unemployment compensation. Presiding Justice Dickinson, joined by Justices Lamar and Coleman, found that the voluntary quit section only applied if Jones failed to notify the employer within 8 hours of being absent, not if he left early. The plurality held that another section of the handbook, which provided penalty points for being tardy, leaving early or reported absent controlled.

Justice Kitchens, in a separate opinion which I joined, agreed that Jones had not constructively voluntarily quit his employment and had not absented himself from work without good cause, he was therefore entitled to unemployment compensation. Justice Kitchens noted that by leaving early Jones was absent and therefore was required to give notice, but that under Section 71-5-513(A)(1)(a), leaving to attend to his pregnant girlfriend was not an act which would disqualify him from receiving benefits.

That provision reads:

> An individual shall be disqualified for benefits:
> . . . For the week, or fraction thereof, which immediately follows the day on which he left work voluntarily without good cause, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to eight times his weekly benefit amount , as determined in each case; however, marital, filial and domestic circumstances and obligations shall not be deemed good cause within the meaning of this subsection. Pregnancy shall not be deemed to be a marital, filial or domestic circumstance for the purpose of this subsection.

Justice Pierce, in a dissent, would have affirmed. He held that the notice provision did in fact apply; but also that Jones had failed to establish good cause for leaving, as he was the only person offering testimony as to why he left, which testimony MESC was not required to accept. C.J. Waller and P.J. Randolph joined this dissent.

Two members of the plurality, Dickinson and Lamar, and the author of the dissent, Pierce, are no longer members of the Court.

Finnie v. Lee County Board of Supervisors, 186 So. 3d 831 (2016):
Finnie is another unemployment compensation case. Finnie, a female, worked as a corrections officer in a juvenile detention center starting in 2004. The prescribed uniform was departmental issued slacks and a shirt. Finnie wore this uniform until she joined a Pentecostal denomination in 2008. Finnie became

concerned about her uniform because in her new religion, slacks were considered as improper attire for women. Finnie's pastor discussed this matter with the sheriff, who in turn discussed it with Finnie and lead her to believe that he would get it resolved.

The sheriff did not get back to Finnie. After waiting six months, relying on the religious nondiscrimination policy in the employee handbook, Finnie started wearing skirts rather than slacks to work. That same day, the shift supervisor informed Finnie that she was out of uniform and in violation of departmental policy. Finnie's second level supervisor also informed her that she was in violation of the uniform policy and gave her a 3 day suspenion without pay. Finnie again spoke to the sheriff, who informed her that she would not be suspended at that time, and the matter would be discussed with her by the end of the day. At day's end Finnie was told that she could wear the pants or resign. Finnie took vacation time as she attempted to resolve the matter. Because her efforts were unsuccessful, Finnie did not return to work, but sought unemployment compensation.

The ALJ and Board of Review found that Finnie's wearing of a skirt was a protected 1st Amendment matter, which entitled her to benefits. Neither the ALJ nor the Board addressed the issue of misconduct. The circuit court found misconduct and denied unemployment compensation benefits to Finnie. In a unanimous decision, the Court reversed and rendered that decision. It noted that Finnie's actions in wearing a skirt consistent with the teachings of her religion may have been inconsistent with the interest of her employer, but it was not a willful and wanton disregard of that interest so as to be misconduct. The Court noted that because this was not misconduct, there was no need to address the constitutional issue.

Hudspeth Regional Center v. Mitchell, 202 So. 3d 609 (2016):

Mitchell worked as a registered nurse at Hudspeth Center. She fell and suffered a back injury. Six weeks after that injury , Mitchell returned to work in her same position, doing the same work without difficulty. Seven months after her return, Mitchell was terminated because she failed to examine a patient when asked to do so and for being tardy.

After being terminated, Mitchell's treating doctor referred her for a

functional-capacity evaluation. That evaluation revealed that Mitchell suffered a 3% permanent partial impairment to her body as a whole. The evaluation placed restrictions on her lifting and prolonged standing. Mitchell sought workers compensation benefits as a result of her earlier back injury. The ALJ awarded Mitchell benefits based upon a total loss of earning capacity. The Commission and an evenly divided COA affirmed that award. On certiorari the Court unanimously reversed and remanded saying, "the Administrative Law Judge and Commission both failed to recognize that Mitchell's return to work created a rebuttable presumption that she suffered no loss of earning capacity." The failure to apply the presumption was legal error and the case was remanded for application of the appropriate standard.

Illinois Central Railroad Company v. Oakes, 237 So. 3d 149 (2018): Oakes had worked for the Illinois Central Railroad from 1952 through 1994. In his work Oakes had daily exposure to asbestos. A Federal Employers Liability Act action was filed in the Warren County Circuit Court to recover damages for Oakes's personal injury and death. This case was tried in 2011, but ended with the jury unable to reach a verdict. In a second trial, the jury found in favor of Oakes, and determined his damages to be $250,000. The jury also determined that Illinois central was 20% at fault and Oakes was 80% at fault and awarded damages of $50,000.

Later it was discovered the asbestos trusts had paid $65,000 for Oakes's injuries and death. Illinois Central filed a motion seeking an automatic setoff based upon the asbestos trusts payments, the net effect of which would have been to eliminate Illinois Central's obligation. The trial court denied that motion and the COA , by a vote of 8-2, affirmed the actions of the trial court, and certiorari was granted. By a vote of 6-2, the Supreme Court determined that while the asbestos trusts were not parties to this action, under the Federal Employer's Liability Act setoff was allowable. It reversed and remanded the case to the trial court to determine whether the asbestos trusts payment was compensation for the same injury for which Oakes had been awarded compensation in this case.

Along with Justice Kitchens, I dissented. Noting Federal joinder law allows that persons may be joined as defendants if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or

arising out of the same transaction, occurrence, or series of transactions or occurrences" and any question of law or fact common to all defendants will arise in the action. Fed. R. Civ P. 20(a)(2). When a plaintiff joins defendants in a lawsuit and the complaint alleges joint liability for the injury caused, the plaintiff essentially admits that the parties are joint tortfeasors. We have no such joinder and no such admission. As such, "the employer bear[s] the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them." ***Norfolk & Western Ry. Co. v. Ayers***, 538 U.S. 135, 165 (2003). The employer made no such demonstration here. It merely put forth the amounts of asbestos trust settlements , without tying them to the injuries of the case or making some demonstration that the asbestos manufacturers were joint tortfeasors.

The United States Supreme Court has explicitly placed the burden on the employer in FELA cases to demonstrate that other parties should bear a portion of the costs. Illinois Central did not do so in this case. Its remedy is to seek contribution from other potential tortfeasors, not a setoff against the damages awarded the plaintiff.

Swindol v. Aurora Flight Sciences Corporation, 194 So. 3d 847 (2016): In 2006, the Mississippi Legislature passed what is now Mississippi Code Section 45-9-55.The relevant portion of that statute reads,

> (1) Except as otherwise provided in subsection (2) of this section, a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area.
>
> (2) A private employer may prohibit an employee from transporting or storing a firearm in a vehicle in a parking lot, parking garage, or other parking area the employer provides for employees to which access is restricted or limited through the use of a gate, a security station or other means of restricting or limiting general public access onto the property.

Swindol was employed by Aurora Flight Sciences Corporation. Aurora had a strict policy under which employees were prohibited from having any firearm on company property. Swindol was fired by Aurora for having a firearm locked in his vehicle on an Aurora parking lot. Aurora informed its employees that it considered Swindol a security risk, and instructed them to call the police if he was seen near the facility.

Swindol filed suit against Aurora in the United States District Court for the Northern District of Mississippi alleging that he had been wrongfully discharged. Aurora filed a 12(b)(6) motion to dismiss, which was granted by Judge Aycock. The District Court held that because Mississippi was an employment-at-will state, under these facts, there was no cause of action for wrongful discharge.

Swindol appealed the dismissal of his claim to the 5th Circuit. Because this was new and unexplored territory, the 5th Circuit certified to the Mississippi Supreme Court the following question: "Whether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55."

This certified question was answered in the affirmative. In a unanimous opinion authored by Justice Lamar, the Court said, "The Legislature has 'independently declared' via Section 45-9-55 that terminating an employee for having a firearm inside his locked vehicle is 'legally impermissible.' As Swindol succinctly argued before the district court: 'an employee is wrongfully discharged if terminated for an act specifically allowed by Mississippi law, the prohibition of which is specifically disallowed by. . . statutory law.'"

Thus in answering the certified question, the Court declined to create another exception to the employment-at-will doctrine.

Note that the Court only addressed the certified question. Not presented to nor addressed by the Court was the question of the balance between the competing rights of a private land owner to control actions on its property and the right of an individual to bring a firearm onto that private property. The Mississippi Supreme Court is a very conservative institution. Generally, it

deliberately attempts to address only what is necessary and to minimize what it says. When one considers the far reaching effects of deciding that Section 45-9-55 provides a cause of action for wrongful termination, perhaps the Court should have also taken into consideration what is the appropriate constitutional balance between private property rights and the rights of gun owners. When one considers the potentially far reaching effects of this decision, and the limitations that it may place on the control of private property, it makes one say "the Court did what?"

This CLE program is presented by the Employment Law Section of the Mississippi Bar. I suggest that as members of the Mississippi Bar, one of the most relevant employment issues of 2018 is the fact that lawyers will be asking the voters of this state to give them employment contracts, or employment contract extensions, to fill all of the county court judgeships, all of the circuit court judgeships, all of the chancery court judgeships, five of the ten Court of Appeals judgeships, and one seat on the Supreme Court. The deadline for giving notice of the intent to solicit these employment contracts is May 11.

A significant number of judges have already announced their retirement. Thus we know there will be a lot of new faces taking the oath as judges in January 2019. As I look at the retirements and the contested races, the number of new faces taking the judicial oath could exceed one-third of the judiciary.

For a long time, Mississippi selected its judges in partisan elections. However, in 1994, Mississippi enacted the " Nonpartisan Judicial Act", which required that Justices of the Supreme Court, Judges of the Court of Appeals, circuit courts, chancery courts and county courts be chosen in non-partisan elections. Mississippi Code Section 23-15-976 prohibits judicial candidates from qualifying as or identifying themselves as being affiliated with any partisan political organization.

The Mississippi Code of Judicial Conduct also requires that candidates for judicial office be nonpartisan. That requirement is found in Canon 5. Canon 5A(1) provides a judicial candidate shall not:

> (a) act as a leader or hold an office in a political organization; (b) make speeches for a political organization or candidate or publicly

endorse a candidate for public office; (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners or political functions.

Canon 5 does allow a candidate to attend political gatherings "to speak to such gatherings in his/ her own behalf while a candidate for election or re-election.

Under Canon 5A(3) A candidate for judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing . . . ;

(c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing. . . ;

(d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

The substance of Canon 5 has been made a part of the Mississippi Code.

In the 1998 legislative session, what is now Section 23-15-977.1 was passed. It requires that candidates for judicial office subscribe to the following oath, "I . . . , do solemnly swear or affirm under penalty of perjury that I will faithfully abide by all laws, canons and regulations applicable to election for judicial office, understanding that a campaign for a judicial office should reflect the dignity, responsibility and professional character that a person chosen for a judicial office should possess." This bill was vetoed by the Governor. That veto was overridden in the 1999 session and this matter became law. The penalty for violation of this provision is a criminal charge of perjury. Since its enactment, I am unaware of any candidate having ever been prosecuted for violation of this statute.

I do not believe that candidates for any other elective office are required to execute an equivalent or similar oath.

While I have not been able to identify any criminal proceedings filed under Section 23-15-977.1, note that campaign misconduct can still subject one to disciplinary action. Canon 5E states that

> Canon 5E generally applies to all incumbent judges, and judicial candidates. Successful candidates, whether or not incumbents, are subject to judicial discipline for their campaign conduct; unsuccessful candidates who are lawyers are subject to lawyer discipline for their campaign conduct. Lawyers who are candidates for judicial office are subject to Rule 8.2(b) of the Mississippi Rules of Professional Conduct....

Rule 8.2(b) places upon a lawyer seeking judicial office an affirmative duty to "comply with the applicable provisions of the Code of Judicial Conduct."

If you are a party to a judicial election and feel that your opponent or a supporter has engaged in campaign activity that is contrary to the Code of Judicial Conduct, I am sure that you would find a measure of satisfaction in knowing that appropriate disciplinary action is being taken under either the Code of Judicial Conduct, or the Rules of Professional Conduct. However the disciplinary process takes time and during the course of a campaign, irreparable harm may be done by that improper campaign activity.

Recognizing that fact, Canon 5F seeks to provide some expeditious relief in the face of what may be improper campaign activity.

> As adopted, Canon 5F provided,
> In every year in which an election is held for Supreme Court, Court of Appeals, chancery court, circuit court or county court judge in this state and at such other times as the Supreme Court may deem appropriate, a Special Committee on Judicial Campaign Intervention ("Special Committee") shall be created whose responsibility shall be to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The Chief Justice of the Supreme Court, the Governor, the Lieutenant Governor, the Speaker of the House of Representatives of the Mississippi Legislature and the chair of the Commission on Judicial Performance (Commission) shall each appoint one member. Those appointed by the Chief Justice, the Governor and the chair of the Commission shall be attorneys licensed to practice in the state.

As first adopted, Canon 5F placed the appointing authority for 3/5s of the membership of this Special Committee in the Executive and Legislative branches of state government. Looking at this matter under the separation of powers provision of our constitution, the Court thought it appropriate to remove the executive and legislative branches from this process. The Court also thought that perhaps the Committee would be better served if all of its membership had a legal background. In December, the Court, in a unanimous vote, amended Canon 5F to provide, "The Chief Justice of the Supreme Court; and the senior justices of Supreme Court Districts 1, 2, and 3, excluding the Chief Justice; and the Chief Judge of the Court of Appeals shall each appoint one member. All members shall be attorneys licensed to practice in the state."

Should any of these persons granted appointments under Canon 5F be a candidate in the current election cycle, that appointment is made by the next senior person.

The Special Committee for the 2018 judicial election cycle is Court of Appeals Presiding Judge T. Kenneth Griffis, appointed by Chief Justice

Waller; Chancellor Ronald Doleac, appointed by Presiding Justice Randolph; Kimberly Campbell, appointed by Presiding Justice Kitchens; Thomas A. Wicker, appointed by Justice Coleman; and Everett Sanders, who, because Chief Judge Joe Lee was a candidate for re-election, was appointed by Court of Appeals Presiding Judge Irving.

The stated objective of the Special Committee is ". . .to alleviate unethical and unfair campaign practices in judicial elections. . . ." In furtherance of this objective, the Special Committee 1) conducts a mandatory election seminar for candidates and key staff, 2) may upon request, issue advisory opinions and 3) receives and addresses allegations of unfair or unethical campaign actions. As you might imagine, this third action is perhaps the most controversial.

Under 5F(3):

> Upon receipt of information facially indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the same by e-mail or facsimile, if available, and U.S. mail to the Special Committee members and said Committee shall: (a) seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary; (b) conduct such additional investigation as the Committee may deem necessary; (c) determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the committee may, in its discretion, disregard the issuance of a cease -and-desist request and immediately take action authorized by the provisions of paragraph (3)(d)(i) and (ii) hereafter described. If the allegations of the complaint do not

> warrant intervention, the Committee shall dismiss the same and so notify the complaining party. (d) If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the Committee is further authorized: (i) to immediately release to all appropriate media outlets , as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease-and-desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and (ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority. . . .

In October of 2017, the Court by vote of 5-3 amended Canon 5F(3). The relevant amendment provides:

> (3) Upon receipt of a written allegation indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by any person(s), committee(s) or organization(s) which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the allegation by e-mail and U.S. Mail to the Special Committee members and the judicial candidate, and said Committee shall: (a) in a manner which comports with due process, provide the candidate with a list of provisions he or she is accused of violating, and provide the candidate an opportunity to respond;

Chief Justice Waller, Presiding Justice Kitchens and I voted against this amendment. The Chief Justice issued a separate statement which said:

I respectfully disagree with the amendment to Canon 5F(3) to require notice to the candidate "in a manner which comports with due process." The Campaign Committee is a body of volunteers who conduct a non-judicial investigation with no authority to impose sanctions or punishment. This is not a judicial process, and the requirement of service "which comports with due process" is both overly burdensome and vague. I agree that the person subject to the complaint must have notice of the complaint and the identity of the party who filed it and must have the opportunity to respond. But no more than this should be required for an administrative proceeding such as this. A civil action is commenced simply by serving a complaint and summons upon the opposing party pursuant to the Rules of Civil Procedure. Is this the "due process" required here? No other rule of judicial procedure uses the term "due process" to describe the manner of notice to a party, and this proposal does not give any guidance to the Committee as to how this requirement can be satisfied. I do not believe we should subject the Bar, the candidates, and the volunteer Committee members to these overly burdensome and unnecessary requirements.

Presiding Justice Kitchens and I joined in that separate statement.

I also objected in a separate statement saying:

I agree that Canon 5F(3) of the Code of Judicial Conduct should be amended to clarify that the subject of any campaign complaint shall be given notice and an opportunity to respond to the substance of that complaint. However, given the purpose of Canon 5F, I disagree with the amendment adopted by the majority. The amendment adopted by the majority is overly broad, unnecessarily restrictive, and inconsistent with the duties assigned to the Special Committee.

Under Canon 5F, the Special Committee is appointed in judicial-election years to address " the propriety of any act or conduct by a judicial candidate, a candidate's campaign organization or an

independent person, committee or organization conducting activities which impact on the election." Canon 5F(4) provides that the work of the Committee shall be informal and non-adversarial, but requires that its work be done "as soon as possible taking into consideration the exigencies of the circumstances." The amendment adopted by the majority eliminates the Special Committee's ability to respond expeditiously to any last-minute complaint.

Section 5F(5) makes abundantly clear that the Special Committee is not a disciplinary body and lacks any authority "to institute disciplinary action against any candidate for judicial office." Notwithstanding the language of Canon 5F, the amendment adopted by the majority incorrectly suggests: 1) that this applies only to candidates for judicial office, and 2) that it imposes disciplinary actions upon judicial candidates. The majority concerns itself more with due process in a non disciplinary judicial-election matter than it does in actual disciplinary actions against criminal defendants, whose liberty or very life is at risk.

Given the purpose and nature of the work of the Special Committee, the right to notice of and an opportunity to respond to a complaint may be clarified by simply inserting a new 5 F (3)(a), reading; "in a manner determined by the Committee, provide the candidate, person, committee or organization against whom a complaint has been filed with notice and an opportunity to respond."

For the foregoing reasons, I object to the order amending Canon5F(3) of the Code of Judicial Conduct.

This statement was joined by Chief Justice Waller and Presiding Justice Kitchens.

This amendment places upon the Special Committee the obligation of making a determination as to what constitutes due process. While given that obligation, the Special Committee is given absolutely no guidance as to what

constitutes due process. As can be seen in the Court's decisions, there appear to be occasions when it has difficulty with due process.

A careful reading of the amended rule would suggest that it bring forth as much room for confusion as it does for clarity.

The Commission on Judicial Performance has the responsibility of providing support services to the Special Committee. Following the release of the order amending Canon 5F(3)(a), the Commission filed a motion asking the Court to clarify the amendment. That motion was merely a very polite way of asking "the Court did what?" The Court denied the motion. I do not know why any other member of the court voted to deny clarification. I voted to deny it. Given the vote split, I felt the best thing to do was to allow the amendment to take effect and look at it again after having some history with it.

Under Canon 5F(7), judicial candidates and their chairpersons are required to complete a two hour course on campaign practices, finance, and ethics. That course will be offered by the Special Committee on May 18 and 25.

I would hope that the conduct of our judicial candidates and others involved in the judicial election process will be of such a high ethical standard that the Special Committee will have very limited work.
However, depending upon the nature and number of complaints filed with the Special Committee, the lack of clarity in the amendment to Canon 5F(3)(a) may well have us ending the year by asking, "The Court did what?"