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Jan 31 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No.: 22-ALJ-22-0098-AP

Appellate Case No. 2022-000982

Miya Freeman, Appellant,

v.

South Carolina Department of Employment
and Workforce and Amazon.com Services, Inc., Respondents.

**Motion to Strike Record on Appeal, Appellant's January 20, 2023 Brief, and Appellant's
January 20, 2023 Designation of Matter.**

Respondent South Carolina Department of Employment and Workforce (the Department) moves this Court to strike the record on appeal filed by Appellant because the record contains multiple fatal defects. Specifically, Appellant's record (1) omits many documents designated by the Department, (2) contains documents not presented to the Administrative Law Court (ALC), (3) contains documents reduced in size and that are difficult to read, and (4) does not comply with the organizational requisites of the Court's rules making it nigh impossible to cite to.¹ Due to the seriousness of the defects with the Record on Appeal, Respondents move this Court to strike the record and require Appellant to file and serve a record on appeal curing these defects and in

¹ These are in addition to the defects the Court noted in the January 23, 2023, deficiency letter.

compliance with the Court's rules, rather than order Appellant to file a supplemental record on appeal. The Department also moves this Court to strike the Brief of Appellant and Designation of Matter filed on January 20, 2023 because it is not in compliance with Rule 209 and 211, SCACR. Further, the Department requests the Court hold all deadlines in abeyance pending the Court's decision on this motion.

I. Factual Background

Appellant filed an appeal in the ALC from a final agency decision issued by the Department's Appellate Panel (Panel). Ultimately, by an Order dated June 21, 2022, the ALC found substantial evidence in the record supported the Panel's determination that the Appellant did not timely appeal the claims adjudicator's decision to the Appeal Tribunal. Appellant now seeks judicial review from this Court.

On October 18, 2022, Appellant filed her initial brief to this Court with numerous documents attached. On October 19, 2022, the Court issued a deficiency letter returning the attached documents to the Appellant with instructions to list them in her designation of matter for inclusion in the record on appeal and providing Appellant ten days to provide a designation of matter. On October 27, 2022, Appellant filed her designation of matter and proposed the following be included in the record:

1. SCDEW Brief of June 7, 2022
2. Administrative Law Court Order of June 21, 2022
3. Full Transcript of Proceeding of June 21 ,2022
4. Transcript of SCDEW Administrative Hearing of January 5, 2022, P.061. Lines 12-14
5. Defendant's Exhibits 1-10
6. Defendant's Exhibits 11: Six (6) SCDEW's Notices of Denial of Appellant Unemployment Benefits.

The Appellant's designation also contained a certification that it contained no matter irrelevant to the appeal. On November 17, 2022, the Department filed a motion requesting an extension to file

Respondent's initial brief and designation of matter which was granted by the Court on November 18, 2022. On November 29, 2022 the Department filed its initial brief and designation of matter and proposed the following be included in the record:

1. Appellant's Notice of Appeal to the ALC dated March 22, 2022.
2. The ALC notice of assignment dated March 23, 2022.
3. The ALC Record filed with the ALC on April 12, 2022.
4. Appellant's Brief to the ALC filed on April 4, 2022.
5. The Department's Respondent Brief to the ALC filed on June 7, 2022.
6. The ALC's Order Affirming the Panel Filed June 21, 2022.

On December 20, 2022, Appellant filed a motion for extension of time to file her record on appeal. On December 21, 2022, the Court granted Appellant an extension to January 23, 2023, to file and serve the record on appeal. On January 20, 2023, Appellant filed a Brief of Appellant, Designation of Matter, and Record on Appeal.²

II. This Court should strike the record on appeal and compel the Appellant to file a proper record on appeal that is in compliance with this Court's rules.

When a party serves its initial brief, the party must also serve a designation of matter under Rule 209, SCACR, which sets forth the documents and materials the party would like included in the record on appeal. Pursuant to Rule 210(c), SCACR, the record on appeal "shall include all matter designated to be included by any party under Rule 209." "The [r]ecord shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c). Because this action challenges a final administrative decision of the Department, appellate review is confined to the same record upon which the agency reached its decision, and is limited to determining

² The Court appeared to only give Appellant credit for filing the Record on Appeal based on the documents designation in C-Track. While the Department cannot discern Appellant's intentions, it appears she submitted a Record on Appeal, as well as another Brief of Appellant and Designation of Matter grouped together as one filing. The document in C-Track has a first page that says Brief of Appellant with a blue cover and a second page designating it the Record on Appeal. Additionally, page eight includes a Designation of Matter.

whether the Department's decision is supported by substantial evidence on the record as a whole, or controlled by an error of law. S.C. Code Ann. § 1-23-380(4) ("The [Court's] review... must be confined to the record."). Pursuant to Rule 210 (h), SCACR, the Court's review is limited to reviewing only the facts that appear in the Record on Appeal.

Here, Appellant's record on appeal is substantially defective in contravention of this Court's rules. First, the record omits many documents, in part or in whole, designated by the Department. The Department filed and served its designation of matter on November 29, 2022, and designated six items. However, Appellant's record on appeal includes only one of the six items designated by the Department, and then only partially. The record includes item six, in part, from the Department's designation of matter, and it completely omits all the remaining items.

Additionally, Appellant's designation of matter was filed on October 27, 2022, which designated six items, but some of those items are also missing from Appellant's record on appeal and appear to have been abandoned by Appellant. Indeed, on the page marked eight, Appellant now improperly includes an entirely new designation of matter, designating eleven items, and that appears to be what she attempted to include in her record. This runs contrary to the requirements of Rule 209.

Appellant's omissions violate Rule 210(c), and the Department requests the Court strike Appellant's record on appeal and require Appellant to file a new record on appeal including all documents designated by the Department. *See* Rule 210(c) (explaining the record on appeal "shall include all matter designated to be included by any party under Rule 209" and noting when a portion of a decision is to be included in the record, the entire decision "shall" be included in the record).

Second, Appellant's record on appeal improperly contains multiple documents that neither party presented to the ALC. For example, pages marked twenty-five through thirty and as "encl 11" in the record appear to be Department claims adjudicator determinations regarding work searches, ability to work, and availability for work. These documents were not presented to the ALC for review and are not even the determinations from which the issue on appeal sprung.

If these documents were somehow relevant to Appellant's proceedings before the ALC, which they are not, she could have presented them to the ALC. However, because Appellant failed to present these documents to the ALC and they are irrelevant to the matter before this Court, Appellant erred by including them in the record on appeal. *See* Rule 210(c) (noting the record on appeal "shall include all matter designated to be included by any party under Rule 209" and "[t]he [r]ecord shall not, however, include matter which was not presented to the lower court or tribunal."). Additionally, pages marked fourteen through twenty-three in the record were also not presented to the ALC and pages marked two through eight appear to be her brief to this Court, and therefore not properly included as part of the record on appeal. Thus, Respondents request the Court strike Appellant's record on appeal and order her to file a new record that complies with Rule 210 and includes only documents and matter within the parties' designations of matter that were presented to the lower court.

Third, Appellant erred by reducing the size of some documents in the record so that multiple pages would fit on each page of the record. Rule 267(c), SCACR requires all documents filed with this Court to be twelve-point font or larger, and photographic reduction is not acceptable if it reduces the size of the font or renders the document unreadable. *See Henning v. Kaye*, 307 S.C. 436, 438, 415 S.E.2d 794, 794–95 (1992) ("Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an

orderly mechanism through which to guide appeals in this State."). Here, pages marked eleven through thirteen contain shrunken images of documents, rendering the documents difficult to read.³

Finally, Appellant erred by not properly formatting the record on appeal. Rule 210(c) provides, "[m]atter contained in the Record on Appeal **shall** be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or document, and a certificate by appellant. Each page of the Record on Appeal **shall** be numbered consecutively beginning with the index." (emphasis added). Here, what Appellant has filed with the Court is frankly indecipherable. It contains both the labels of a brief and a record. The index is more reflective of brief than a record. While the composition of documents is eclectic, she failed to include the documents in the Department's designation of matter and included a whole new designation of matter for Appellant. This arrangement of documents not only failed to include the matter in the Department's designation, it is not in proper order, and not properly paginated as pages numbered eleven and twelve are on the same page with unreadable images. Therefore, Respondents request this Court strike Appellant's record on appeal and require Appellant to file and serve a new record on appeal in compliance with the Court's rules.

III. This Court should strike the brief of appellant and designation of matter filed on January 20, 2023, for failing to comply with this Court's rules.

Along with the record on appeal and within the same document set, Appellant appeared to also file a new brief and designation of matter. Appellant had previously filed her initial brief and designation of matter in accordance with Rule 208 and 209, SCACR, the deadline for filing her initial brief and designation of matter has passed, and she has made no motion for leave to amend.

³ Additionally, neither the copy received in the mail by the Department nor the one viewable online through C-Track are legible enough to determine if these documents are part of either the Appellant or Department's designations of matter or were otherwise presented to the lower court.

As such, she is not permitted to file a new initial brief and designation of matter. Additionally, the brief that was filed on January 20, 2023, is not a proper final brief. Final briefs are required to be identical to the initial brief except for references to the record and correction of typographical errors and misspellings. Rule 211(b), SCACR. The January 20, 2023, brief is not identical to the initial brief, specifically, the statements of the issues on appeal have changed, and there were no updates to attempt to reference the record on appeal. As such, the January 20, 2023, brief of appellant and designation of matter should be stricken.

IV. Conclusion

Based on the foregoing, the Department moves this Court to strike all documents filed by the Appellant on January 20, 2023. The record on appeal filed by Appellant should be stricken because the record contains multiple fatal defects. Specifically, Appellant's record (1) fails to contain many documents designated by Respondents, (2) improperly contains documents not presented to the ALC, (3) contains documents reduced in size and that are difficult to read, and (4) is not properly formatted. The brief of appellant and designation of matter filed on January 20, 2023, should be stricken for failing to comply with the Court's rules. Due to the number of defects and the seriousness of them, the Department moves this Court to strike the record and require Appellant to file a new record on appeal remedying these defects and in compliance with the Court's rules. The Department also moves this Court to strike the January 20, 2023, brief of appellant and designation of matter, and have Appellant file a Final Brief in accordance with the Court's rules. Finally, the Department requests the Court hold all timelines in abeyance pending the Court's ruling on this motion.

[signature on following page]

Respectfully Submitted,

s/ Valerie McMellan.

Valerie McMellan (SC Bar # 101080)

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In the Court of Appeals

APPEAL FROM THE
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Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No. 2022-000982

Miya Freeman,

Appellant,

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Respondents.


PROOF OF SERVICE

I certify that I have served the Respondent's Motion to Strike Record on Appeal, Appellant's January 20, 2023 Brief, and Appellant's January 20, 2023 Designation of Matter on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2023, addressed to the parties at their addresses of record:

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Elgin SC 29045

Amazon.com Services Inc.
PO Box 16560
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January 31, 2023



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