

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge

Case No. 2011-ALJ-22-0440

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Case No. 2012207406

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South Carolina Department of Employment and Workforce,

Appellant

v.

Kimberly Morrow and A Wing and A Prayer (Employer),

Respondent

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FINAL BRIEF OF RESPONDENT

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Kimberly M. Morrow  
112 Captain Tom Ct.  
Spartanburg, SC 29306  
(864) 809-8586  
Respondent

## ISSUES ON APPEAL

- I. The Administrative Law Court did not exceed its scope of review by substituting its judgment for that of the Department on a question of fact contrary to the South Carolina Code and case law.*
  
- II. The record did not contain substantial evidence to support the department's determination that I was ineligible to receive unemployment benefits based on my status as a corporate officer and restricted exposure to the general labor market.*
  
- III. The Court clearly decided on the facts as on the whole record as to my controlling interest in the company and did not use unwarranted exercise of discretion.*
  
- IV. The Appendix to the Initial Brief contains documents that are a part of the Department's own literature and are documents to refute new information that was not previously filed in the Record.*

## STATEMENT OF THE CASE

I, Kimberly Morrow, am listed as Vice President of A Wing and a Prayer, Inc. which trades as Blue Star BBQ restaurant. I worked as the Manager of Blue Star BBQ from September 16, 2009, through January 23, 2011. The stockholders (Raymond Hicks and Christopher Morrow)(R. 42, 43), of which Raymond Hicks was the controlling stockholder in the corporation (R. 43), came to the conclusion that due to corporate losses (R. 40, 41), and the fact that there were no funds in reserve, he would have to close the business. With a 2 to 1 controlling interest in stock holdings (R. 42, 43), as well as the

financier of the business, it was a case of the business not being able to operate financially. As a result, I filed to Unemployment benefits on February 1, 2011 (R. 4). I was found to be ineligible due to the fact that I was an Officer of a Corporation who had control over my unemployment (R. 10).

I appealed the claims adjudicator's decision to the SCDEW Appeal Tribunal (R. 11). During that hearing, I testified that I was not acting under A Wing and A Prayer, Inc. (R. 24, L. 26) and further testified that I was also looking for a new restaurant location on my own time which was clarified by the Hearing Officer (R. 27, L. 1, 2, 3). After that hearing, the Tribunal determined that I did not meet the eligibility requirements of the law under South Carolina Code 41-35-110 (eligibility)(R. 44, 45). This was stated in the REASONS section of decision no. 2011-A-6251 (R. 45) which indicated the reasons for the denial of eligibility. The only mention of me being a Corporate Officer is in the FINDING OF FACT (R. 44). I appealed the Tribunal's decision to the SCDEW Appellate Panel (R. 46) and in its decision, the Panel affirmed the Tribunal's decision.

Lastly, I appealed the Department's final decision to the Administrative Law Court. The Honorable Shirley C. Robinson reversed the Department decision upon finding that I had no corporate position and, as is shown in sworn testimony, there was no effort to continue operating the business which is supported in the Record.

## FACTS

The business known as A Wing and a Prayer, Inc. was incorporated in 2005 by Raymond Hicks, Douglas Hicks, Kathy Hicks, and Krista Hicks. This is supported by the filing of the Initial Annual Report of Corporations filed JAN 18, 2005 with the South Carolina Secretary of State (Appellate Court Brief Appendix, P. 7). On September 16, 2009, I was brought in as the Operations Manager of Blue Star BBQ by Raymond Hicks after exercising his controlling interest in the company to remove his brother, Douglas Hicks, by a 2 to 1 vote of stockholders. This relegated Douglas to a mere stockholder in the company and allowed Raymond to hire me (SC Law Court Rebuttal Appendix, P. 11, 12 (Appellate Court Brief Appendix P. 14, 15)). As a result of that move, Douglas sold his shares of A Wing and a Prayer, Inc. back to the company (Appellate Court Brief Appendix P. 17) and were bought by Christopher Morrow (Appellate Court Brief Appendix P. 18, 19). The stock certificates were issued to him and recorded in the Corporate records. The stock split was 6500 shares to Raymond Hicks and 3500 shares to Christopher Morrow (SC Law Court Rebuttal Appendix, P. 6, 7, 8 (Appellate Court Brief appendix P. 16, 17, 18, 19)). Due to the distance that Raymond Hicks lives from the restaurant, he lives near Miami, FL, the Corporation was restructured, naming me as Vice President. In this role, I had no more input in the business than my role as Operations Manager, since I had no stock in the Corporation. During the discussions of closing the business, Raymond consulted with me about the state of affairs with the business. With the economic factors that were involved, he had simply run out of operating funds for the Corporation, this forced the restaurant to close. The fact that I concurred with his decision is not evidence that I had

control over the closing. After filing for unemployment, I reported to my local office. During that visit, an associate with the Department asked me questions about my efforts to find employment. I advised her on my continuing efforts and she asked if I was going to try and open a new restaurant. I told her that was looking at different locations on my own time. She said that it was considered looking for work and asked how many hours per week that I spent looking. I had no idea and she asked if it was at least 20 hours per week. I said that it may be and it was noted on my sheet (R. 8, 9). I then stated that I was attending GED classes, which is required according to the pamphlet given by the Department titled **“Your Benefit Responsibilities and Rights”** on page 3 (Appellate Court Brief Appendix P. 1, 2, 3, 4, 5, 6). It is noted under the heading **“To Be Eligible”**. Their documentation clearly states that in order to be eligible and be in school, ***“you must notify your claimstaker if you are in school”*** (Appellate Court Brief Appendix P. 3). The classes are offered Monday through Thursday from 8:30 AM until 12:30 PM and are on a voluntary basis and flexible, meaning you are not compelled to be in the class the whole time and I could come and go as needed. Also while in class, I had my cell phone on and available for prospective employers to call.

Christopher Morrow testified that he was Treasurer and submitted stock certificates showing ownership of the Corporation (R. 42, 43). These stocks are kept in the Corporate records as there is no official filing of stocks with the State of South Carolina. He also submitted a profit and loss statement dated 4/13/2011 (R. 40, 41). There are differences in the profit and loss statement that was dated 3/17/2011 (R. 15, 16) as Christopher was

wrapping up the accounting of the business. As can be seen, there was approximately \$9,000.00 to \$10,000.00 in more losses after all of the accounting was finished.

It is not an issue before the court and has no bearing on this case; however, upon further research in the issue of the Registered Agent, Christopher submitted the proper paperwork with the South Carolina Secretary of State which was officially stamped and dated FEB 12, 2010 by the Secretary of State (Appellate Court Brief Appendix, P. 7, Appellate Court Brief Appendix, P. 20, 21, 22, 23)). The Secretary of State's office erroneously placed Christopher as the registered agent of A Wing and A Prayer Enterprises. Upon being notified of the discrepancy, the Secretary of State's office corrected the issue. Again, the employment of Christopher Morrow has no bearing in this case.

### **ARGUMENT**

In the Department's opening argument, they state that "where there is conflicting evidence on the status of a worker, it becomes a question of fact" (Initial Brief of Appellant P. 6). The fact is that I stated on record that I was not working for A Wing and A Prayer, Inc. in my efforts on my own time to look for a new location (R. 24, L. 26, R. 27, L. 1, 2, 3). Where is the conflict in that statement? There cannot be two inconsistent conclusions

as to whether or not I was working for the company when I clearly state that I was not.

They further assert that the burden is on the party seeking to overturn an agency decision “to prove convincingly that the agency’s decision is unsupported by the evidence.” My sworn testimony that they are trying to use against me as fact is also being ignored when I stated that I was “**not working for a Wing and A Prayer, Inc.**” (R. 24, L. 26). Is it not reasonable that sworn testimony be the facts of this case when it conflicts with what they want to “**assume**”? Would sworn testimony that clarifies what the Department **assumes** not be considered “substantial evidence”? This would fit the court substituting their judgment for the Department’s judgment based on “(e) clearly erroneous in view of the reliable, probable and substantial evidence on the whole record”.

### **Law/Analysis**

***1. The Administrative Law Court did not exceed its scope of review by substituting its judgment for that of the Department on a question of fact contrary to the South Carolina Code and case law.***

The Administrative Law Court correctly reversed the Department’s decision that I was ineligible due to my corporate status and lack of availability due to limited exposure to the general labor market. I admitted my search for a restaurant location in estimating approximately 20 hours per week. This was spent on my personal time and never interfered with my pursuit of employment. I turned in every “Record of Work Seeking Activities” (Appellate Court Brief Appendix P. 8, 9, 10, 11, 12) on my assigned dates

that I was required to report to my local office. This is the only proof that the Department requires of anyone on unemployment to show that they are looking for work and there are no probative questions as to what Claimants are doing during their week to determine eligibility.

I further submit that in the handbook issued by the Department entitled "Your Benefit Responsibilities and Rights", page 3 (Appellate Court Brief Appendix P. 1, 2, 3, 4, 5, 6) clearly states that "**To Be Eligible**", you **must** notify your claimstaker that you are enrolled in classes. Now they state that their own guidelines for eligibility are grounds for ineligibility.

In their own admission, they have stated that a doctor's appointment would make you ineligible for benefits for that week. I do not believe that the legislators, nor the courts, have such a stringent view. My activities of 20 hours per week looking for a **new** restaurant accounted for 12% of a 7 day week, which is comprised of 168 hours, compared to 23.8% which accounts for 40 hours in a 7 day week. (S.C. Law Court Brief, P. 2 (Argument 2)). Also, my GED classes of 16 hours per week accounts for 9.5% of the same 7 day week. (There was no extracurricular homework or studies involved with my classes and travel time included the dual purpose of looking for employment.)(Initial Brief of Appellant, P. 8) After accounting for a 40 hour work week and my personal activities, there is still 92 hours in a 7 day week.

The public advertising that the Department refers to was a free listing on the internet that was initially opened by Douglas Hicks in July of 2009 and updated with my information in October of 2009. There was no further activity on that account as they do not follow up with the free accounts that they service. This is shown in them having an address and phone number that are out of business. I do not have to explain how entries on the internet are circulated and extremely hard to remove completely.

As the department asserts, to look at the totality of the evidence, my personal endeavors accounted for less than 20% of a 7 day week. The substantial portion of the week, more than 80%, was free for the pursuit of

employment. The ALC correctly asserted that I was not “self employed” because I stated that I was not working for the Employer.

***II. The record did not contain substantial evidence to support the department’s determination that I was ineligible to receive unemployment benefits based on my status as a corporate officer and restricted exposure to the general labor market.***

Even though I held myself out as Owner and Manager of the business, the fact still remains that I had no personal holdings in the business. The State of South Carolina has no official filing for stock certificates with the Secretary of State. The official filing lies with the company and their records. Christopher Morrow showed the corporate stocks (R. 42, 43) that were issued to himself and Raymond Hicks.

The “unofficial” P&L reports were entered into evidence by the Treasurer of the Corporation, Christopher Morrow. He, by the action of entering them into evidence and testifying to them under oath, has certified them.

The assertion that I had a significant and controlling interest in the business is only under my title as Manager. It has been clearly shown that Raymond Hicks had controlling interest and Christopher Morrow had a minority share in the business. This shows that I had 0% controlling interest in the business as there were no shares issued to me. How can I have any voting interest in the business if I had no stocks in that business?

Some of the assets were placed into storage and Raymond Hicks graciously allowed me to keep some of the fixtures if I was to find a venture of my own. However, as has been previously testified to, I am not working under A Wing and A Prayer, Inc..

As so far as the “unrestricted exposure” aspect of this case. In all of the case referrals that the Department cites, e.g. *Murphy v. S.C. Employment*

*Sec. Comm'n.*, 328 S.C. 542, 544, 49 S.E.2d 625, 627 (Ct. App. 1997), Murphy refused work except during certain days and times. I have never refused any work, nor have I restricted myself during certain days or times of the week. To compare my case to *Murphy*, would be to compare apples to oranges.

The Department also cites *McEachern*, 370 S.C.553, 635 S.E.2d 644, which is a case involving the President and sole owner of a company working for his open company while not drawing a paycheck. How can that case be cited in this matter as I have testified under oath that not only was the restaurant closed, but that my looking for a restaurant location was not for A Wing and A Prayer, Inc.. Again, they are comparing apples to oranges.

The Department further claims that there is no proof that I have applied for work; however, I have reported for every eligibility review and turned in my "Record of Work seeking Activity" reports (Appellate Court Brief Appendix P. 8, 9, 10, 11, 12, 13). This is what is required to receive benefits. Now they say that there is nothing to substantiate this assertion. This lends a reasonable person to believe that they are disregarding what they require in their own regulations for eligibility. This is conflicting.

***III. The Court clearly decided on the facts as on the whole record as to my controlling interest in the company and did not use unwarranted exercise of discretion.***

Again, the Department cites *McEachern* in their arguments. There are two major differences in this case and *McEachern*. One is the fact that he was the sole owner/stockholder in his company and he testified that he was working for the furtherance of his business which was still operating. I only filed for unemployment benefits after the restaurant was closed and I had no stock in the corporation at all.

In all of the cases cited by the Department, they involve individuals that had some equitable stake in their prospective companies. The record shows that I have 0% stock in A Wing and A Prayer, Inc. and as such I have no degree of control of the corporation or its solvency. I cannot dissolve a corporation in which I have no controlling stock. The Departments assertion that I am working for a company that is still listed with the S.C. Secretary of State is of no relevance when I testified that my looking for a new location is not in the furtherance of the Corporation and I have no control over the Corporate functions. This is the defining factor in this case that cannot be ruled over by decisions involving Corporation stockholders and true business owners.

***IV. The Appendix to the Initial Brief contains documents that are a part of the Departments own literature and are documents to refute new information that was not previously filed in the Record.***

There were several documents that were placed in the Appendix of the Initial Brief that were submitted to refute the erroneous statements of the department.

The Department literature that they disperse is introduced, but should not have to be a part of the Record because it is part of their own Standard Operating Procedures that are stated in their pamphlet "Your Benefit Responsibilities and Rights". This should not have had to be introduced on the record as it is the procedures that the Department should have been following and should not be in question. (S.C. Appellate Court Brief Appendix P. 1 – 6)

Appendix page 7 shows that their claim that I was one of the founding members of the Corporation has been shown to be in error and has been on file with the S.C. Secretary of State, yet they continually cite myself and Christopher Morrow as founders of the Corporation. Again, this is to refute their erroneous investigation and should be evidence of the lack of attention to the facts.

Appendix pages 8 through 13 are papers that are on file with the Department showing my efforts to look for a job as per their requirements. They have asserted that there is no record of my efforts, which is a false statement due to the fact that these documents are on file with the Department.

Appendix pages 14 and 15 are the pages of the Shareholders Meeting and shows the termination of the Original minority shareholder, which again

shows the flawed investigation of the Department as to the makeup of the Corporation.

Appendix 16 through 19 are the stock certificates that are a part of the Record, but were added to the Brief for clarification purposes.

Appendix pages 20 through 23 are the original Articles of Incorporation and the Amended Articles of Incorporation that were all on file with the S.C. Secretary of State and, for the final time, shows the flawed investigation by the Department.

These documents show that the information that was conveyed to the S.C. Administrative Law Court were in error but were in no way relevant to the arguments that they made. They were only fluff for the purpose of trying to discredit myself and others that were involved in this case.

### **CONCLUSION**

I stand on my arguments that were originally set in my Initial Brief. I believe that there can be no more clarification other than what is logically laid out for the Court.

The Administrative Law Court did not exceed its authority in ruling that I am eligible because the Department excluded parts of the record that did not suit them, namely sworn testimony from me. There is no substantial evidence in the record to support the Department's decision, which is only

held up by supposition and innuendo. The Administrative Law Court decision should be upheld.

Respectfully submitted,

Kimberly M. Morrow

112 Captain Tom Ct.

Spartanburg, SC 29306

(864)576-5777