

In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No.: 11-ALJ-22-0440-AP
Appellate Case No. 2012-207406

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JUN 13 2014

SC Court of Appeals

Kimberly M. Morrow,

Respondent,

v.

South Carolina Department of Employment
and Workforce and A Wing and A Prayer, Inc.,

Defendants,

Of whom South Carolina Department of Employment
and Workforce is

Appellant,

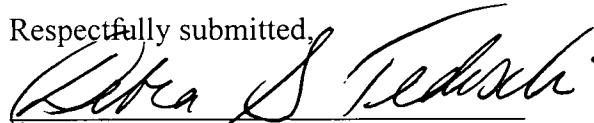
and A Wing and A Prayer, Inc. is also

Respondent.

MOTION FOR REHEARING

Appellant, the South Carolina Department of Employment and Workforce (“the Department.”), pursuant to Rule 221(c), SCACR, moves this Court for rehearing of the decision filed May 28, 2014 (Opinion No. 5235). The Department’s reasons for the motion are in the attached Memorandum in Support.

Respectfully submitted,



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Attorneys for Appellant

June 12, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
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Shirley C. Robinson, Administrative Law Judge

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Appellant,

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Respondent.

MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

Appellant, the South Carolina Department of Employment and Workforce (“the Department”), as grounds and authorities in support of its Motion for Rehearing, states the following:

ARGUMENTS

In order to prevail on a motion for rehearing, a party must state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 221(a), SCACR. A Court should grant a motion for rehearing when it appears “any material fact or principle of law has been...overlooked or misapprehended.” Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 481, 377 S.E.2d 343, 352 (Ct. App. 1988).

I. The Court Overlooked or Misapprehended Relevant Points of Law

S.C. Code Ann § 1-23-610 sets forth this Court's standard of review for a decision by the Administrative Law Court ("ALC") regarding the ALC's review of the Department's final decision. That standard is as follows:

The review of the administrative law judge's order must be confined to the record. The court of appeals may reverse or modify the decision only if substantive rights of the appellant [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion or affected by other error of law.

S.C. Dep't of Corrections v. Mitchell, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (S.C.App. 2008) (internal citation and quotation marks omitted).

In affirming the decision of the ALC, the Court of Appeals has sanctioned the ALC's substitution of its own judgment for that of the Department's Appellate Panel. See S.C. Code Ann. § 1-23-380(5) (Supp. 2013) ("The court may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact."); see also Murphy v. S.C. Emp. Sec. Comm'n, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997) ("Whether a claimant is available for work is a question of fact for the [Panel]."). As the dissent correctly points out, the Court overlooked the well-established point of law that the "substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside." Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) Judge Williams, in the instant case's dissent, succinctly isolates the point of law overlooked or misapprehended by the majority when he states: "the ALC independently weighed the [existing] evidence and found Morrow had unrestricted access to the general labor market....

[T]he ALC impermissibly weighed the evidence and substituted its judgment for that of the Panel's in making this determination.”

By upholding the ALC's decision, the majority opinion likewise has exceeded its scope of review. See Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995) (“Appellate scope of review in this action is limited to determining the existence or not of substantial evidence supporting the factual findings of [the Panel]”).

II. Both the Majority Opinion of this Court and the ALC Impermissibly Reweighed the Facts.

Ultimately, the majority opinion of this Court has endorsed the ALC's invasion of the province of the Panel as the ultimate finder of fact. See Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999) (Panel is fact finder and it is not within Court's province to reverse Panel's findings if they are supported by substantial evidence); see also Milliken & Co. v. S.C. Emp. Sec. Comm'n, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996) (“on questions of witness credibility we defer to the judgment of the agency”).

The Majority Opinion stated the following:

The fact that Morrow was a student does not automatically make her ineligible to receive unemployment benefits. She was in school to obtain her GED, which is an admirable pursuit in the event of unemployment, but also a pursuit that can be deferred if full-time employment becomes available. She testified she always had her phone with her in class in case prospective employers called. She also stated she would leave school if she were offered full-time employment. **We find these facts to be substantial evidence she was available for employment.**

(Emphasis added.)

Clearly, the majority re-weighed the facts, as did the ALC. In contrast, the Panel found that because Morrow not only spent time in school pursuing her GED, she also spent an estimated 20 hours per week looking to open the restaurant in a new location. The Panel

weighed **both these facts together** and found that Morrow had not met her burden to show her availability.

Indeed, the Court's holding in this case has shifted the burden to prove unrestricted exposure to the labor market from the claimant to the Department. The law is clear (and was expressly cited by majority) that the "burden is on a claimant to show compliance with benefit eligibility requirements. This includes a duty to show availability for work and a reasonable effort to obtain employment." Wellington v. S.C. Emp. Sec. Comm'n, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). Moreover, "[w]hether a claimant is available for work is a question of fact for the [Panel]." Murphy v. S.C. Emp. Sec. Comm'n, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997). Nonetheless, the ramifications of the majority opinion are that: (1) the Panel improperly weighed the facts in evidence; and (2) the claimant no longer has the burden to show unrestricted exposure to the labor market. Thus, the majority opinion clearly conflicts with established precedent. See Id.; Wellington, supra.

Furthermore, the majority opinion encourages claimants to restrict their availability to the labor market, as long as they have good reasons for doing so (i.e., to obtain a GED, and/or look for a location to open a restaurant). While valiant and noble motives, the South Carolina Legislature has made certain exceptions to the availability requirements of the law, such as approved training. See S.C. Code Ann. § 41-35-110(3)(a). The Legislature has not, however, made pursuing a GED or scouting restaurant locations an exception to the statutory availability requirement. § 41-35-110. Therefore, whether such endeavors restrict one's availability to seek and accept full-time work is a question of fact for the Panel which should not have been overturned by this Court.

CONCLUSION

Accordingly, the Department moves this Court to grant its Motion for Rehearing and reverse the ALC's decision awarding Morrow unemployment benefits and reinstate the decision of the Panel to deny Morrow unemployment benefits.

Respectfully submitted,



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Counsel for Appellant

June 12, 2014

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PROOF OF SERVICE

I certify that I have served the **Motion for Rehearing** and **Memorandum in Support of Motion for Rehearing** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on June 12, 2014, to the following address:

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June 12, 2014

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June 12, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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RE: Kimberly M. Morrow v. SCDEW and A Wing and A Prayer
Case No.: 2011-ALJ-22-0440-AP

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Motion for Rehearing and Memorandum in Support of Motion for Rehearing of the Respondent, SC DEW in the above referenced case. Also enclosed is a Proof of Service to the other parties.

Please let me know if you have any questions.

Sincerely,

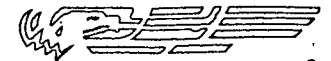

Jessica Chesley
Administrative Legal Assistant for
Trey McLeod
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