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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2014-000453

Antonio Hough

Appellant,

v.

Town of Pageland

Respondent,

REPLY BRIEF OF APPELLANT

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Argument in Reply

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent.

I. Summary Judgment in the present case was not proper.

A. Respondent fails to recognize that the affirmative defense that has been relied upon for summary judgment is a separate and distinct defense than the one pled.

S.C. Code Ann. 41-1-80 states the affirmative defenses of a Worker's

Compensation retaliation claims as follows:

Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer's property; failure to meet established employer work standards; malingering; embezzlement or larceny of the employer's property; violating specific written company policy for which the action is a stated remedy of the violation.

The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for total permanent disability, is in no manner to be considered a violation of this section.

“If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look

for or impose another meaning.” *City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Based upon the plain and ordinary language of the statute above, failure to meet established work standards, and violation of company policy are two distinct affirmative defenses. Respondent relies upon *Plyer v. Burns*, 647 S.E. 2d 188, 194, 373 S.C. 637 (S.C. 2007) to proffer that a complete failure to assert an affirmative defense can be cured by later relying on it so long as surprise is avoided and no prejudice results. However, Plyer is factually distinct from the present case in that the affirmative defenses in *Plyer* were the same defense of judicial immunity, one being statutory in nature and the other, common law. *See Generally Id.* Further, in the present case Appellant is prejudiced by the court’s allowance of the affirmative defense because Appellant would have to proffer different arguments and strategies unlike the parties in *Plyer* that could rely on the same strategy to both defenses.

B. Respondent fails to acknowledge that Hough was terminated before it was determined that Hough could no longer perform his job duties.

Respondent cites multiple cases in which an employee was terminated due to the inability of the employee to continue to perform the prescribed work abilities. However, Respondent fails to acknowledge that in each and every instance of termination in these cases, the employee was determined to be unable to continue these duties prior to being terminated. In *Horn v. Davis Elec. Constructors, Inc.*, 416 S.E.2d 634, 307 S.C. 559 (S.C. 1992), Horn was temporarily disabled as a result of a back injury and was eventually released with restrictions that were not compatible with his job description as an electrician’s helper. *Id.* at 635. Horn attempted to return to work

but was subsequently refused employment due to this determination. *Id.* at 634-35.

Further, the *Horn* court held that Horn had not been afforded a reasonable rehabilitation period before termination. *Id.* 636. The employee in *Johnson v. J.P. Stevens & Co., Inc.*, 417 S.E.2d 527, 308 S.C. 116 (S.C. 1992) was released to return to work for his job-related injury but was subsequently terminated due to a secondary disability of blackouts that made it unsafe for him to continue his occupation as forklift driver. *Id.* at 528.

Again, this termination was made after the restriction was made. *Id.* In *Hinton v. Designer Ensembles, Inc.*, 540 S.E.2d 94, 343 S.C. 236 (S.C. 2000), Hinton was subsequently terminated after he was released with restrictions, and missed the requisite amount of days due to those restrictions. *Id.* at 95-6. The employee in *White vs. Malphus Construction, Co. Inc.*, 9:07 - 3052-PMD-RSC (D.S.C. 2006) was also subsequently terminated after a doctor's determination that he would not be able to resume the job duties he had performed prior to the accident. Respondent further fails to recognize the language in the quote provided in page seven (7) of their Brief which states that:

Under *Hines*, even if plaintiff has been fired as a result of his workers compensation claim his cause of action would be fatally deficient because it is undisputed that plaintiff was unable to perform his duties as a delivery helper at the time his employment was terminated. *Morgan v. Mattress Gallery, LLC*, No. 2:05-CV-2035-DCN, 2006 WL 1878983, at *3 (D.S.C. July 6, 2006) (emphasis added).

A review of these cases makes it apparent that the established case law requires that injured employees be determined unable to perform their duties before they are terminated. It is undisputed that Appellant was terminated on August 18, 2011 (*R. p. 3, lines 17-18*) and received a permanent disability rating on September 1, 2011. (*R. p. 60*).

Based upon the above case law, the proper time for Hough's termination would have been after September 1, 2011. Never the less, Hough's contention is that the Town's assertion of this as an affirmative defense is pretextual in nature and the causal connection test then employs, which was the crux of Hough's argument at summary judgment.

C. Respondent misinterprets case law contained in the order of the court prepared by the Respondent.

In their argument in opposition of any causal connection between Hough's termination and his worker's compensation claim, Respondent relies on *Todd vs. S. Carolina Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602, 283 S.C. 155 (S.C. App. 1984). This case was cited in the order granting summary judgment, which was drafted by the respondent at the behest of the trial court and does not correlate to the facts in the present case. In *Todd*, two separate entities were involved in the action and were intertwined in such a way that agency became an issue of admissible testimony during the trial itself. The testimony that was presented at trial was inadmissible due to the fact that that the witness himself had not heard the conversation that was the topic of the examination. *See Generally Id.* In the present case, it is undisputed that Wesley Miles, Hough's supervisor, was an agent of the Town. Moreover, Bobby Joe Rollins personally heard the statements made by Wesley Miles. (*R. p. 141*) As Appellant argued at the summary judgment hearing, because Rollins heard the statement from Miles, a Town of Pageland representative, it would be admissible as an admission by party-opponent pursuant to SCRE 801(d)(2). Therefore, *Todd* is distinct from the present case in that the affidavit presented to the court at Summary Judgment phase was offered by a witness to the statement's made by Hough's supervisor, an agent of the town.

Respondent further relies on *Clark v. Flow Measurement, Inc.*, F. Supp. 519 (D.S.C. 1996) to support the inadmissibility of the affidavit. The statement relied upon in *Clark*, was hearsay within hearsay. The statement also involved a statement by an employee, who the court noted had little to no knowledge of the subject of the statement made.

Like *Todd, Clark* involved a much more complicated business infrastructure where agency became an issue. Here, the relationship between supervisor and employee is much simpler. *See Generally Id.* This direct relationship would create an apparent authority in the decision to terminate Hough.

“Apparent authority to do a particular act "is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” *Genovese v. Bergeron*, 490 S.E.2d 608, 610 327 S.C. 567, 570 (S.C.App. 1997) (quoting *Muller v. Myrtle Beach Golf and Yacht Club*, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct.App.1990)).

Muller further states that “[t]he principal must either intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief. *Id.*

Wesley Miles was Hough’s supervisor and was appointed to that position by the Town of Pageland. Wesley Miles’ statement to Bobby Joe Rollins shows Miles at least was assertive that he had the authority from the Town to terminate Hough. (*R. p. 141*). Hough believed the same. The Town’s appointment of Miles as a supervisor coupled with Miles’ statement made to inferior employees and those employee’s reliance on such

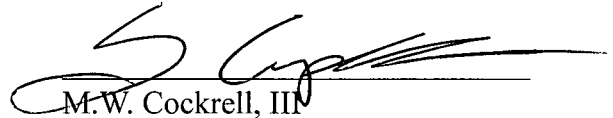
statements creates an apparent authority between the Town and Miles as to his ability to fire an employee.

CONCLUSION

Based upon the foregoing argument, in addition to the arguments made Appellant's initial brief, the Appellant, Antonio Hough, respectfully requests that this Court reverse the trial court order granting summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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November 14, 2014
Chesterfield, South Carolina

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PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief on Town of Pageland by depositing a copy of it in the United States Mail, postage prepaid on September 25, 2014, addressed to its attorney of record Charles F. Thompson, Jr., Malone, Thompson, Summers, & Ott, LLC, 339 Heyward St, Columbia, SC 29201

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CERTIFICATE OF COUNSEL

I certify that the Reply Brief of Appellant complies with S.C.R.A.P. 211(b)



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