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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC Court of Appeals

Billie Mueller,)
)
Appellant,)
)
vs.)
)
South Carolina Department of Employment)
and Workforce, and Ebtron, Inc.,)
)
Respondents.)
_____)

Docket No. 14-ALJ-22-0405-AP

ORDER

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to Appellant Billie Mueller's (Appellant) appeal from the decision of the Appellate Panel of the South Carolina Department of Employment and Workforce (DEW). The Appellate Panel affirmed the Appeal Tribunal's finding that Appellant was discharged from her employment with Ebtron, Inc. (Employer) for misconduct connected with the employment, specifically, her failure to timely process \$55,000 in bonuses for sales employees during 2013.

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MOTION TO STRIKE AND RESPONSE

Appellant filed her Notice of Appeal on July 25, 2014. The Record on Appeal was filed September 22, 2014. Appellant filed her brief on September 30, 2014.¹ Appellant's brief contains attachments labeled as Exhibits lettered A-J. However, on October 15, 2014, Employer filed a Motion to Strike and Remove Documents from Record. Specifically, Employer moved the Court to strike and remove from the Record Exhibits A, D, E, F, G, H, I, and J attached to Appellant's Opening Brief, and Exhibits A, B, and C attached to Appellant's Application for Leave to Appeal to the Appellate Panel, which had been filed on June 10, 2014.

Employer argues that Appellant had an opportunity to present additional evidence in the evidentiary hearing but failed to do so. Employer also argues that one of the documents is of a confidential nature and that Appellant has a contractual commitment to maintain that confidentiality. On October 21, 2014, Appellant filed a Motion to Strike and Remove Respondent Ebtron's Motion to Remove Documents from the Record, which the Court interprets

¹ Pursuant to ALC Rule 37(A), Appellant had ten (10) days after DEW filed its brief (on October 15, 2014) to file a reply brief if she wished. Appellant did not file a reply brief.

I never received this brief

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as a Reply to Motion. She alleges that Employer intended to “marginalize to the court, [sic] information which was in their power to provide at the time of the initial hearing conducted by [DEW].” She also argues that contractual terms, though confidential, should be disclosed to the Court to give the Court “a clear understanding[,]” since “the Court was placed in the status of need to know.”

Pursuant to ALC Rule 46, an administrative law judge has the power to “strike from the record objectionable evidence” In this case, Appellant was afforded the opportunity to offer these additional documents into evidence during the evidentiary hearing before the Appeal Tribunal but failed to do so. Indeed, this is the very reason why the Appellate Panel declined to admit these documents when Appellant attempted to have them admitted at that time. Likewise, this Court cannot entertain evidence that was not presented to the trier of fact. *See Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989) (“It would be utterly inappropriate for an appellate court to reverse a trial court's decision in reliance on evidence never submitted to the trial court for its consideration.”). Therefore, the Court hereby grants Employer’s Motion to Strike and Remove Documents from Record and denies Appellant’s Motion.

FACTS/PROCEDURAL BACKGROUND

Appellant was employed by Employer for approximately twenty-seven years. She was terminated from her employment with Employer in April 2014. Afterwards, Appellant filed an initial claim for unemployment benefits with DEW on April 4, 2014. A DEW claims adjudicator determined that Appellant was discharged for misconduct and disqualified her from receiving benefits for twenty weeks pursuant to South Carolina Code §41-35-120(2) (A) (2013). Specifically, the claims adjustor found that Appellant failed to perform assigned work to the employer’s satisfaction and in a manner that employer had a reasonable right to expect. Appellant appealed that determination to the Appeal Tribunal.

On May 27, 2014, the Appeal Tribunal conducted an evidentiary hearing in which both Appellant and Employer participated. At the hearing, Appellant admitted that she had failed to process the paperwork properly, specifically that maybe she “wasn’t proactive enough” and that the project “fell by the wayside.” As a result of Appellant’s action, the Employer had errors totaling \$55,000 affecting the bonus for sales associates and creating substantial tax consequences for Employer. On May 28, 2014, the Appeal Tribunal affirmed the initial determination that Appellant had been discharge for misconduct.

On June 5, 2014, Appellant filed an appeal with the DEW Appellate Panel. On July 2, 2014, the Appellate Panel reviewed the Record and affirmed the Appeal Tribunal's decision that Appellant was discharged from her employment due to misconduct.

Appellant filed this action with the ALC on July 25, 2014. Appellant asserts that the Appellate Panel erred in finding her actions constituted misconduct under S.C. Code 41-35-120(2)(A) and erred in finding that Appellant willfully failed to perform her duties.

STANDARD OF REVIEW

DEW is an "agency" under the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the DEW, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of DEW. *See* S.C. Code Ann. §§ 1-23-380, -600(E) (Supp. 2013); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367; *McEachern v. S.C. Employment Sec. Comm'n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) of the South Carolina Code (Supp. 2013) sets forth the standard for appellate bodies to use in reviewing agency decisions. That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5); *see also* § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub Serv.*

Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

DISCUSSION²

Misconduct Under S.C. Code 41-35-120(A)(2)

The Appellate Panel found that Appellant's action constituted misconduct under S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2013). Specifically, it found that Appellant failed to complete her job duties to the employer's satisfaction because she failed to process bonuses in an expeditious manner.

In her brief, Appellant³ makes conclusory statements of her version of the facts. She asserts that her dismissal was improper because she was not given any warning before her dismissal. In addition, Appellant asserts that her leaving the company has been misrepresented.

S.C. Code Ann. § 41-35-120 (2)(a) provides that "misconduct"

is limited to conduct evincing such wilfull and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

As noted in the statute, "misconduct" includes the disregard of the standard of behavior which an employer can rightfully expect from an employee, or intentional and substantial negligent

² The Court notes from the outset that because Appellant's discussion in her brief contains only allegations and conclusory statements of her version of the facts but no discussion of, or citations to, legal authority, Appellant's arguments would be deemed abandoned on appeal. But the Court takes this opportunity to explain why Appellant's appeal would nevertheless have been unsuccessful even had the arguments been properly preserved.

³ In her brief, Appellant refers to herself as Petitioner rather than Appellant. Because the ALC has appellate jurisdiction over DEW cases, the Court will refer to Mueller as Appellant.

disregard for an employee's interests, duties, or obligations. *Lee v. S.C. Employment Sec. Comm'n*, 277 S.C. 586, 291 S.E.2d 378 (1982).

The facts in this case are similar to the facts in *DeGroot v. Employment Sec. Comm'n*, 285 S.C. 209, 328 S.E.2d 668 (Ct. App. 1985), where a claimant was "discharged for refusal to follow instructions and carelessness." *DeGroot* at 211, 328 S.E.2d at 669.⁴ In *DeGroot*, the employer stated that the appellant had "too many mistakes in typing specifications and some of her work had to be redone by a part-time secretary." *Id.* *DeGroot*, on the other hand, testified "she was discharged because she was unable to keep up with the work." *Id.* The Court of Appeals found that substantial evidence supported the Commission's determination because claimant "had the ability to avoid numerous typographical mistakes and work at the standard her employer could rightfully expect" and the part-time secretary had to redo some of her work. *Id.* at 212, 328 S.E. 2d at 670.

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Here, the record shows that Employer was harmed in the amount of \$55,000 due to Appellant's failure to process bonuses in a timely manner. Appellant does not contest that finding. She even admitted that she "wasn't proactive enough" in obtaining the statistics she needed to process bonuses and "it kinda fell by the wayside." Appellant also acknowledged in her brief that there were unpaid commissions for the third and fourth quarters of 2013. Instead, Appellant contends that the company was not harmed due to her failure to process these bonuses. She further argues that she was not provided a warning that her job was in jeopardy, that she was not given the help she needed, and that a coworker was rude. However, Appellant had her 2013 Performance Review in February 2014 and signed a Probation Notice based on that review. Nevertheless, as in *DeGroot*, the Record contains substantial evidence that Appellant's action

⁴ The court in *DeGroot* referenced S.C. Code Ann. § 41-35-120(2) (1976 & Supp. 1983). Though the statute then was different than the statute as it appears now, the differences for purposes of this case are immaterial. The version used in *DeGroot*, as the current version, required intent for misconduct and excluded from misconduct substandard performance resulting from inability or incapacity. Compare S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2013) (requiring that misconduct involve "wilfull and wanton disregard of an employer's interest" or "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer") with S.C. Code Ann. § 41-35-120(2) (1976 & Supp. 1983) (requiring that misconduct involve "wilful failure or neglect of duty," and "misconduct had to involve "more than a failure in good performance of the employee as the result of inability or incapacity"). Thus, the court in *DeGroot* had the option to find that the claimant had an inability to complete her work in an acceptable fashion due to her workload, which claimant asserted was so heavy that she was unable to keep up. However, the Court of Appeals instead found that there was substantial evidence to support the ESC's determination that the claimant was, in fact, able to complete her work in an acceptable fashion and whose failure to do so and consequent discharge were due to misconduct on her part.