

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles W. Wade,

Docket No. 14-ALJ-22-0280-AP

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Hardee's Restaurants,
LLC,

Respondents.

ORDER

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DEC 17 2014

SC Court of Appeals

STATEMENT OF THE CASE

Charles W. Wade (Appellant) appealed the decision of the South Carolina Department of Employment and Workforce (Department), which disqualified him from receiving unemployment benefits for a period of twenty (20) weeks because his employer, Hardee's Restaurants, LLC (Employer), discharged Appellant for misconduct pursuant to S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2012). The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2013). Upon consideration of the record and the briefs, this Court affirms, finding that substantial evidence supports the Department's decision.

BACKGROUND

Appellant worked for Employer from May 19, 2011 until December 4, 2013, most recently as a backline cook. Employer's District Manager, Diane Pulley (Pulley) approached Appellant on December 4, 2013, and reminded him to put on his gloves. He refused to do so, telling Pulley that he was allergic to them. Pulley was not aware of Appellant being allergic to the gloves until then. Appellant had not furnished a doctor's statement to Employer. Pulley informed Appellant that he would need to get medical documentation to provide to the employer, and she was sending him home so that she could figure out what to do. Pulley assured Appellant that she was not firing him, but he could not work on the backline without wearing gloves, and therefore, needed to leave for the day since he could not work without gloves. Appellant refused to comply with Pulley's instruction to go home and told her that he was not going to leave unless she fired him. Appellant became increasingly loud, argumentative and disrespectful towards

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Pulley. Pulley then reached the point where she told him that he was discharged for insubordination.

Appellant acknowledged that he was aware that company policy required employees to wear gloves when handling food and he had worn gloves in the past. However, the company had recently switched to a different glove, and Appellant noticed his hand turned red and irritated when he wore the new gloves. Appellant believed he was allergic to the new gloves and refused to wear them. A week prior to his termination, Appellant showed Ann Pitts, his shift leader, the red discoloration on his hands. Pitts told Appellant that she was going to talk to Pulley about it, and they would try to order some other gloves. At the time of Appellant's termination, Pitts had not yet discussed the matter with Pulley. Appellant contended that Pulley discharged him for insubordination because he would not wear the new gloves.

Pulley denied that she discharged Appellant for refusing to wear the gloves. Pulley reiterated to Appellant that she was not firing him, but was sending him home to get medical documentation to provide to the employer because he could not work backline if he did not wear gloves. Appellant still refused to comply, and Pulley stated that, "he continued to get louder and louder, and he got very close to me in my face," and at that time, she discharged Appellant for insubordination because he was yelling at her.

Appellant applied for unemployment benefits on December 4, 2013. On December 23, 2013, upon reviewing the documentation submitted by the parties, the Department's Claims Adjudicator found that Appellant was terminated by Employer "because [Appellant] did not make use of health and/or safety equipment required by the Employer when performing [his] work. Appellant's failure to make use of such items was contrary to the Employer's best interests." Appellant was disqualified from receiving unemployment benefits for a period of twenty (20) weeks with a corresponding monetary deduction, upon finding Employer discharged Appellant for misconduct in connection with the employment pursuant to S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2012). Appellant subsequently appealed the Claims Adjudicator's decision to the Department's Appeal Tribunal on December 30, 2013¹, which conducted a *de novo* evidentiary hearing on March 31, 2014, where the Appellant and his three witnesses and counsel

¹ Despite its name, the Department's Appeal Tribunal actually functions as a trial tribunal, hearing testimony, taking evidence, and making findings of fact. See 24 S.C. Code Ann. Regs. 47-51(C)(1), (E)(1) (Supp. 2013). Hearings before the Tribunal are held *de novo*. Regs. 47-51(C)(1).

for Employer and its witness appeared. On April 3, 2013, the Hearing Officer modified the Claims Adjudicator's decision finding that Appellant was discharged for cause and that he was disqualified from receiving unemployment benefits for sixteen weeks. Appellant appealed the decision to the Appellate Panel on April 9, 2014, and on May 7, 2014, the Department's Appellate Panel issued the final decision modifying the Tribunal's decision, which found that Appellant was discharged for misconduct connected with the employment and that he was disqualified from receiving unemployment benefits for twenty weeks. Appellant then timely filed an Appeal to the ALC on June 5, 2014.

ISSUE ON APPEAL

Does the evidence in the record support the Department's finding that Appellant was discharged for misconduct connected with his employment pursuant to S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2012)?

STANDARD OF REVIEW

The Department 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 Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, and 1-23-600(D) (Supp. 2012); 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). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2012). See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). 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 [of an agency] 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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

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, when considered as a whole, 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. Dept. 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)).

DISCUSSION

The Appellant argues that the Department erred in finding that he was discharged for misconduct connected with his employment. The Court disagrees.

Because the findings of the Appellate Panel are different than those reached by the Appeal Tribunal in this case, it is necessary to briefly discuss the Appellate Panel’s scope of review. Under Section 41-35-710 of the South Carolina Code (Supp. 2013), the Appellate Panel may review a decision of an appeal tribunal “on the basis of evidence previously submitted in the case” or it may “direct the taking of additional evidence.” Importantly, the Appellate Panel “has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal.” Merck, 290 S.C. at 460-61, 351 S.E.2d at 339 (interpreting a prior, but substantially similar, version of Section 41-35-710). Since the Appellate Panel acts as the Department’s ultimate fact-finder, this Court must affirm the factual findings of the Appellate Panel if they are supported by substantial evidence. Id. at 461; 351 S.E.2d at 339; S.C. Code Ann. § 41-35-750 (Supp. 2013).

The Appeal Tribunal found that Appellant was discharged for cause, other than misconduct, and disqualified him from benefits for 16 weeks. The Appellate Panel, however,

modified the decision of the Appeal Tribunal and found that Appellant was discharged from the most recent work for misconduct connected with the employment pursuant to S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2012). Specifically, the Appellate Panel found that:

The record establishes that [Appellant] raised his voice to upper management in an argumentative and disrespectful manner. An employer has a right to expect employees to respond to management with respect and to conduct themselves in a professional manner in the workplace. The [Appellant] knew or should have known that responding to management in a disrespectful and combative manner could result in his termination. Contrary to the Appeal Tribunal, we find the [Appellant's] conduct, directed toward upper management, rises to the level of misconduct. The [Appellant] deliberately disregarded the standard of behavior the employer had the right to expect. Therefore, we find the [Appellant] was discharged for misconduct connected with the employment. The Appeal Tribunal decision is modified.

A discharge for misconduct is "limited to conduct evincing such willful 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." S.C. Code Ann. § 41-35-120(2)(a) (Supp. 2012).

The Appellate Panel decision rests upon the finding that Appellant was terminated for disrespectful behavior towards upper management. The Appellate Panel found that it was inappropriate and unprofessional for Appellant to raise his voice to upper management in a loud, argumentative and disrespectful manner. The Employer has a right to expect all employees to respond to their superiors in a respectful manner and conduct themselves professionally in order to promote a harmonious work environment. The Appellate Panel concluded that the Appellant knew or should have known that his insubordinate behavior would result in his termination.

That conclusion is supported by the substantial evidence in the record showing that Appellant behaved in a disrespectful and unprofessional way towards his superior. Accordingly, this Court concludes that the Appellate Panel did not err by determining that Appellant was terminated due to misconduct. Appellant contends that proper weight was not given to his witnesses' testimony. While there is conflicting evidence, the Court finds that the agency's decision was clearly not erroneous in light of the substantial evidence in the record, and that the record supports the decision.

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

December 4, 2014
Columbia, South Carolina

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FORM 7
PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Dept. of
Employment and Workforce,
Hardee's Restaurants, LLC,
Administrative Law Court,
Respondent

APPEAL FROM
THE
ADMINISTRATIVE
LAW COURT

Deborah

Brooks
Durden, Administrative v.
Law Judge

Docket No. 14-ALJ-22-0280-AP

Charles W Wade,
Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy of it in the United States Mail, postage prepaid, on December 13, 2014 addressed to the attorney of record.

December 13, 2014

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