

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

DOCKET NO: 13-ALJ-22-0555-AP

STEPHANIE C. STAGGERS STEWART,Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
AND
OCONEE COUNTY, Respondents.

INITIAL BRIEF OF RESPONDENT OCONEE COUNTY

RECEIVED

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SC Court of Appeals

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RESTATEMENT OF ISSUES OF APPEAL

- I. THE ADMINISTRATIVE LAW COURT PROPERLY RULED THAT APPELLANT'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE SHOULD BE DENIED.
- II. THE APPELLANT WAS NOT DENIED DUE PROCESS RIGHTS BY THE ADMINISTRATIVE LAW COURT'S REVIEW OF THE RECORD.
- III. THE ADMINISTRATIVE LAW COURT PROPERLY REFUSED TO CONSIDER AND ENTER INTO THE HEARING RECORD THE APPELLANT'S PLEADING WITH DOCUMENTARY EVIDENCE.
- IV. THE ADMINISTRATIVE LAW COURT DID NOT VIOLATE THE APPELLANT'S PROCEDURAL AND SUBSTANTIATIVE CONSTITUTIONAL DUE PROCESS RIGHTS IN UPHOLDING THE APPEAL TRIBUNAL'S DECISION.
- V. THE ADMINISTRATIVE LAW COURT DID NOT COMMIT ERROR IN FAILING TO STRIKE FROM THE RECORD "STATEMENT OF FACTS" FROM THE RESPONDENT'S BRIEF.
- VI. THE ADMINISTRATIVE LAW COURT CORRECTLY HELD THAT THE RELIABLE PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD ESTABLISHED THE APPELLANT WAS TERMINATED FOR EMPLOYEE MISCONDUCT.
- VII. THE ADMINISTRATIVE LAW COURT PROPERLY CONCLUDED THAT THE APPELLANT'S MISCONDUCT WAS FOR CAUSE AND IN ACCORDANCE WITH THE HANDBOOK.
- VIII. THE ADMINISTRATIVE LAW COURT CORRECTLY HELD THAT THE APPELLANT HAD ABANDONED HER ARGUMENT AND THAT THE EVIDENCE DID NOT SUPPORT THAT APPELLANT WAS DENIED HER FIRST AMENDMENT RIGHT TO PURSUE THE GRIEVANCE.
- IX. THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE SUPPORTS THE PANEL'S AND ADMINISTRATIVE LAW COURT'S FINDINGS THAT APPELLANT COMMITTED MISCONDUCT.

STATEMENT OF THE CASE

The Appellant, Stephanie C. Stagers Stewart (hereinafter "Stewart" or "Appellant"), was terminated from employment with the Respondent Oconee County (hereinafter "Oconee County"), on May 9, 2013. Following her termination, Stewart filed for unemployment benefits with the Respondent South Carolina Department of Employment and Workforce (hereinafter "SCDEW"). By Notice dated May 23, 2013, SCDEW found Stewart was discharged from her job for improper actions on the job, disciplined for actions contrary to what an employer has a right to expect, and discharged for misconduct connected with the employment under S.C. Code Ann. § 41-35-120(2)(A). As a result, it was determined Stewart was disqualified from 20 weeks of benefits effective May 9, 2013 through September 12, 2013 with a corresponding monetary reduction. (SCDEW Notice dated 5/23/2013).

Stewart filed a Notice of Appeal to the SCDEW Appeal Tribunal (hereinafter "Tribunal") on May 30, 2013 alleging that Oconee County's basis for separation was not the result of Stewart's improper actions or improper behavior but instead was from Stewart's exercise of her rights under the FMLA, complaints of fraudulent abuse of overtime by a co-worker, and complaints of racial discrimination. (Notice of Appeal to Appeal Tribunal, 5/30/2013). On August 17, 2013, Appellant filed with the Tribunal Appellant's *Motion to Submit Declaration of Facts, Documentary Evidence, and Arguments Into Tribunal Hearing Record With Brief and Support* which included as many as 31 written documents. (Appellant's Motion with exhibits). Pursuant to the Notice of Appeal, an evidentiary hearing was held on August 20, 2013 before Administrative Hearing Officer, Lane K. Cook (hereinafter "Hearing Officer Cook"). Both the employer

and Appellant participated and introduced documents into evidence. The Decision issued August 23, 2013 affirmed the prior determination that Appellant was disqualified from receiving benefits for 20 weeks, along with the corresponding reduction in the maximum potential benefit amount, upon finding the Claimant was discharged for misconduct. (Decision of Appeal Tribunal mailed 8/23/2013). Thereafter, on October 18, 2013, Appellant filed with the Panel *Appellant's Motion to Include [Appellant's] Previously Submitted Motions and Documentary Evidence for the August 20, 2013 Tribunal Hearing as Part of the Appellant Panel Record*. (Motion dated 10/18/2013). The Panel heard oral arguments on October 22, 2013 during which Appellant renewed her previous Motions by way of *Written Arguments in Support of Granting Unemployment Compensation with Renewed Motion to Include Previously Submitted Tribunal Hearing Arguments and Documentary Evidence as Part of the Appellant Record*. (Appellant's Written Arguments and Renewed Motion submitted October 22, 2013). Thereafter, on October 25, 2013; the Panel issued SCDEW's Final Decision affirming the Tribunal Decision disqualifying Appellant from receiving benefits for a period of 20 weeks effective May 9, 2013 through September 21, 2013 with a corresponding monetary reduction upon a finding she had been discharged for misconduct pursuant to S.C. Code Ann. § 41-35-120(2)(A) (2012). (Appellate Panel Decision mailed 10/25/2013). In addition, the Panel denied Appellant's Motions to include additional evidence and/or remand the case to the Tribunal for the purpose of taking further testimony. (Appellant Panel Decision mailed 10/25/2013).

The lengthy history of numerous motions and other pleadings filed by the Appellant (which necessitated replies by Respondents) is recited below to reflect the unreasoned approach of the Appellant. Stewart filed a Petition for a Judicial Review with the

Administrative Law Court on November 18, 2013. SCDEW filed the Initial Record on Appeal on December 11, 2013. Subsequently, on December 22, 2013, Stewart filed four (4) Motions including: (1) Motion to Compel the Respondent to Correct and Re-Submit the Entire Record on Appeal, (2) Motion for Consent to File and Enlarge Initial and Reply Brief, (3) Motion for Enlargement of Time to File Initial and Reply Brief, and (4) Motion to Compel Respondent to Redact Appellant's Personal Identification Information From Record on Appeal. On January 6, 2014, SCDEW filed a Response in Opposition to Stewart's Motion to File an Enlarged Initial and Reply Brief. Stewart filed a Reply in Opposition on January 17, 2014 arguing the enlarged Petition was only to present the facts and establish the racial grievance defense raised at the lower appellate level. On January 22, 2014, SCDEW filed a Notice of Consent and Motion to Supplement the Record on Appeal and included a Supplemental Record on Appeal. On January 31, 2014, Stewart submitted a Response in Opposition to Respondent's Motion arguing the Supplemental Record on Appeal further excluded Appellate Panel transcripts and evidence submitted during the Appeal Tribunal. On February 4, 2014, the Administrative Law Court issued an Order directing SCDEW to re-submit the Record on Appeal and other information not included in the original Record on Appeal filed on December 11, 2013. On February 17, 2014, SCDEW filed the Record on Appeal. On March 3, 2014, Stewart filed a Motion for Sanctions, Correction of Record on Appeal, and that the Briefing Deadline be Held in Abeyance Due to an Incomplete Record on Appeal filed by the Respondent. On March 12, 2014, SCDEW filed a Response. On March 17, 2014, Stewart mailed a Traverse to the Respondent's Reply to her Sanctions Motion. On March 18, 2014, Stewart's Motion for Sanctions and Request for Appellate Panel Transcripts was denied. Stewart thereafter filed

a Motion for Reconsideration on March 19, 2014. Stewart's Motion for Reconsideration was also denied. Stewart served the Initial Appeal Brief of Appellant by mail on April 8, 2014. Stewart filed an Application for Leave to Present Newly Discovered Evidence on April 8, 2014. Oconee County filed a Response to Appellant's Application for Leave to Present Newly Discovered Evidence on April 17, 2014. Stewart then filed a Traverse to Respondent's Response to Appellant's Application for Leave to Present Newly Discovered Evidence dated April 22, 2014. In addition, SCDEW filed a Response in Opposition to Appellant's Application to Present Newly Discovered Evidence dated April 22, 2014. Stewart filed a Motion of Judicial Notice dated April 24, 2014. SCDEW also filed a Motion for Extension to File Respondents' Briefs dated April 25, 2014. Stewart filed the Appellant's Reply in Opposition to the Respondent's Motion for Extension to File Respondents' Briefs dated April 28, 2014 and Appellant's Reply to Respondent's Second Opposition to Appellant's Application to Present Newly Discovered Evidence dated April 28, 2014. Stewart also filed an Addendum to Application for Leave to Present Newly Discovered Evidence dated April 30, 2014.

Oconee County's Brief was filed May 5, 2014 and SCDEW's Brief was filed May 8, 2014. An Order denying Stewart's Motion to Submit Newly Discovered Evidence was filed by the Administrative Law Court on May 8, 2014. Stewart thereafter filed a Motion for Enlargement of Time to File Reply Briefs to Respondents' Two (2) Responses to Appellant's Initial Brief. On May 15, 2014, the Administrative Law Court issued an Order denying Stewart's Motion for Enlargement of Time of File Reply Briefs to Respondents' Two Responses to Appellant's Initial Brief. On May 19, 2014, Stewart filed a Motion to Reconsider. The Administrative Law Court subsequently issued an Order dated May 21,

2014 denying Stewart's Motion to Reconsider the Court's Denial of Appellant's Application for Leave to Present Newly Discovered Evidence. The Administrative Law Court issued an Order affirming the Appellate Panel's Decision denying Ms. Stewart's qualifications for unemployment benefits on June 9, 2014. Stewart appealed for a judicial review of the Final Decision of the Administrative Law Judge with the South Carolina Court of Appeals.

STATEMENT OF FACTS

Stewart was hired on January 10, 2011 by Chief Administrative Summary Court Judge Todd Simmons (hereinafter "Judge Simmons") as a Magistrate Clerk to fill a position in the Walhalla Magistrate Court. (TOR, pp. 5, 12). Following a short training period in Seneca, South Carolina, the Appellant went to work in the position for which she was hired in Walhalla, South Carolina. Ms. Stewart worked at that location until September 19, 2011 at which time Judge Simmons decided to transfer her to a location in Seneca, South Carolina. (TOR, p. 10). Appellant's transfer was prompted by her accusations that certain personnel at the Walhalla location were out to sabotage her and treated her in a harsh, discriminatory, and hostile manner. (TOR, p. 9). After Stewart's transfer to Seneca, Judge Simmons and others took certain actions to improve the Walhalla work environment. Judge Simmons believed that he had resolved the inter-office personality differences about which Appellant complained in the Walhalla office. (TOR, p. 13).

Prior to the May 3, 2013 meeting which resulted in Appellant's termination, Judge Simmons had determined that due to work load requirements, he had no choice but to transfer Appellant back to the Walhalla location. (TOR, p. 13). On Friday, May 3, 2013,

Judge Simmons and Appellant, along with Debbie Sheriff (hereinafter “Sheriff”), met to discuss his decision to transfer Stewart back to Walhalla. (TOR, p. 5). During this meeting, Appellant refused the transfer to Walhalla because she allegedly had received negative treatment by the Walhalla staff. (TOR, p. 9). Judge Simmons assured the Appellant that those issues had been resolved and that her transfer was necessary to fully staff the Walhalla location with the appropriate number of clerks. (TOR, p. 9). At the conclusion of the meeting, Appellant requested to have a conversation with Judge Simmons off the record and outside the presence of her co-worker, Sheriff. (TOR, p. 11). During this conversation, Appellant asked Judge Simmons about a phone call that Appellant asserted Judge Simmons had received. (TOR, p. 42). According to Appellant, a Court clerk had called Judge Simmons and informed him that Sheriff had falsified overtime on Sheriff’s timesheets. (TOR, p. 42). Judge Simmons responded that he did not recollect receiving or engaging in such a phone conversation. (TOR, pp. 8, 42). Appellant responded to Judge Simmons by calling him “a liar” or by stating that Judge Simmons was “lying.” (TOR, pp. 5, 7, 8, 42, and 29). Appellant was then placed on administrative leave and told by Judge Simmons that she needed to determine whether she would report to Walhalla and that he was going to discuss the matter with the County Administrator. (TOR, p. 6). Based on the Appellant’s actions, Judge Simmons intended to terminate Stewart’s employment, however, he wished to confirm his authority to do so with the County Administrator, Scott Moulder, (hereinafter “Moulder”). (TOR, p. 11).

Despite a number of phone calls, Judge Simmons did not have an opportunity to discuss the situation in detail with Moulder until Thursday, May 9, 2013. (TOR, p. 7). Judge Simmons documented the May 3, 2013 meeting in a memo dated May 7, 2013.

(TOR, p. 7). On May 9, 2013, Judge Simmons discussed the matter with Moulder and Glenn Breed (hereinafter “Breed”), Assistant County Administrator, and it was determined that Judge Simmons had the authority to terminate Stewart. After receiving confirmation of his authority, Judge Simmons contacted the Appellant and terminated her in the presence of Magistrate Judge John Norton (hereinafter “Judge Norton”) and Court Clerk, Elizabeth Bracket (hereinafter “Bracket”). (TOR, p. 28). At that time, Appellant stated to Judge Simmons, “I did not call you a liar. I said you were lying.” (TOR, p. 29).

STANDARD OF REVIEW

The South Carolina Supreme Court has determined that the Administrative Procedures Act governs the standard of judicial review of decisions and awards issued by SCDEW. Pursuant to the APA:

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 procedures;
- (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) (2008).

The appellate courts have held that the “substantial evidence” test which governs the Court’s review dictates that the Court must examine whether, “considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative

agency reached.” *Merck v. S.C. Employment Security Comm’n*, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986); *Murphy v. S.C. Employment Security Comm’n*, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997). Moreover, the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s findings. *McEachern v. S.C. Employment Security Comm’n*, 370 S.C. 553, 557, 635 S.E.2d 644, 647 (Ct. App. 2006). If there is a conflict in the evidence, either different witnesses or of the same witnesses, the findings of fact of the Panel as triers of the fact are conclusive. *Holcombe v. Dan River Mills-Woodside Div.*, 286 S.C. 223, 225, 333 S.E.2d 338,340 (Ct. App. 1985). The review court is not to pursue “judicial fact-finding, or the substitution of judicial judgment for agency judgment.” *Todd’s Ice Cream, Inc. v. S.C. Employment Security Comm’n*, 281 S.C. 254, 258, 315 S.C.2d 373, 375 (Ct. App. 1984). Thus, while there may be conflicting evidence in the present case, if there is substantial evidence to support the findings of fact of SCDEW, the reviewing court should affirm the agency’s decision.

ARGUMENTS

- I. THE ADMINISTRATIVE LAW COURT PROPERLY RULED THAT APPELLANT’S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE SHOULD BE DENIED.**
- II. THE APPELLANT WAS NOT DENIED DUE PROCESS RIGHTS BY THE ADMINISTRATIVE LAW COURT’S REVIEW OF THE RECORD.**
- III. THE ADMINISTRATIVE LAW COURT PROPERLY REFUSED TO CONSIDER AND ENTER INTO THE HEARING RECORD THE APPELLANT’S PLEADING WITH DOCUMENTARY EVIDENCE.**
- IV. THE ADMINISTRATIVE LAW COURT DID NOT VIOLATE THE APPELLANT’S PROCEDURAL AND SUBSTANTIATIVE CONSTITUTIONAL DUE PROCESS RIGHTS IN UPHOLDING THE APPEAL TRIBUNAL’S DECISION.**

V. THE ADMINISTRATIVE LAW COURT DID NOT COMMIT ERROR IN FAILING TO STRIKE FROM THE RECORD "STATEMENT OF FACTS" FROM THE RESPONDENT'S BRIEF.

Stewart essentially maintains in her first five (5) arguments that her due process rights were denied by the failure of SCDEW and the Administrative Law Court to submit her written arguments and 31 exhibits supporting and evidencing her defense.¹ While Stewart submitted these documents prior to the hearing by way of Motion, Stewart failed to request that the documents be submitted into evidence at the hearing. Appellant argues that the hearings are to be conducted informally in conformity with the Administrative Procedures Act. No one prevented Stewart from moving to have the documents admitted. Stewart maintains that while she did not formally request that the documents be admitted as exhibits, her Motions and reference to the Motions should have been all that was required. However, Stewart acknowledged in her Brief that she used several of these documents during her cross-examination of the witnesses. Stewart maintains that by excluding this evidence from the Record, she was denied her Constitutional due process rights by not being allowed to present evidence regarding discrimination and retaliation.

The Appellant was not denied her due process rights. The record establishes the Appellant referenced and argued her discriminatory and retaliatory allegations, many of which are contained in these records, during the hearing before Hearing Officer Cook. Stewart raised these very allegations with the Hearing Officer. (TOR, p. 15, ll. 17-19, p. 38, l. 14 - p. 39, l. 22). Furthermore, Stewart fails to recognize that the issue before the Administrative Law Court is a narrow issue concerning her rights to unemployment benefits. The South Carolina Supreme Court has held that SCDEW hearings are not

¹ Because a number of the Appellant's Arguments are mis-jointed and overlap, Respondent has grouped the Arguments in an attempt to clarify the issues before the Court.

“forums for employers and employees to engage in lengthy civil litigation of claims relating to an employee’s discharge.” *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). Instead, the narrow issue to be decided is whether the Claimant is qualified to receive unemployment benefits. The Court stated in reaching its conclusions that the jurisdiction of SCDEW is limited and that by focusing on this narrow issue, SCDEW is able to effectively determine whether an employee is entitled to unemployment benefits. *Shelton v. Oscar Mayer Foods Corp., Id.* The issue in this case is whether there is substantial evidence in the Record to support Stewart’s termination for cause. Stewart’s additional evidence is not necessary to reach this decision and, accordingly, the Appellant was not denied her due process rights.

Stewart similarly maintains that the SCDEW and the Administrative Law Court erred by not admitting written arguments and documents submitted by way of her Motion into the Record. The documents are the same as those Stewart failed to submit into evidence at the hearing before Hearing Officer Cook. Appellant asserts that these documents are material to her defense that she committed no misconduct and was terminated for reasons other than misconduct. She states these documents support her argument that she was merely grieving her transfer and engaged in First Amendment protected speech. These defenses, however, were clearly raised and argued by Stewart at the hearing. (TOR, p. 15, ll. 17-19, p. 38, l. 14 – p. 39, l. 22). Lastly, Stewart disputes the Appellate Panel’s reference to the documents as “additional evidence.”

The Appellant takes the position that the Decision of SCDEW was controlled by an error of law because SCDEW and the Administrative Law Court: (1) violated her substantive and/or procedural due process rights at the administrative hearing level by

failing to admit into the Record the written arguments and documents included in her Motion and (2) abused its discretion by failing to remand the case back to the Tribunal for the taking of additional evidence for the purpose of rectifying Appellant's failure to submit the written arguments and documents. Due process requires adequate notice, adequate opportunity for a hearing, the right to introduce evidence, and the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). The Record shows that the Appellant did not admit into evidence nor proffer her written arguments or any of her 31 documents. As a result, these documents were not made a part of the Record on review. The Appellant, however, was permitted to raise these issues and they were considered by the trier of fact.

Stewart also fails to recognize that the documents and arguments about which she complains are not relevant as to whether she was terminated for cause or misconduct. Stewart was terminated for calling Judge Simmons a liar and questioning his veracity in his courtroom. Stewart acknowledged this during the hearing. (TOR, p. 41, l. 17 – p. 42, l. 20). While Stewart seeks to introduce documents supporting her allegations that the termination was not for misconduct but based on discrimination and retaliation, the testimony and substantial evidence in the Record establish otherwise. As stated earlier, these issues and arguments were raised by Stewart during the hearings and considered by SCDEW and the Administrative Law Court.

Stewart also objects to those documents as being labeled "additional evidence." Clearly, these documents are merely cumulative of evidence already in the Record. Furthermore, Stewart was given the opportunity to make these arguments at the hearing. The hearing transcript reflects that the Appellant failed to offer the written arguments or

documents into evidence. As a result of Appellant's failure to offer these documents into evidence, an objection to the offer or a ruling on the admissibility was never held. While the Appellant filed a Motion to have her written arguments and documents admitted prior to the hearing, none of the documentation was actually introduced at the hearing, and as a result, the Appellant deprived Oconee County of its opportunity to object and/or offer rebuttal evidence.

As the South Carolina Supreme Court has previously stated:

To hold evidence to which reference is made, but which is not offered into evidence, is admissible would severely prejudice the party opposing its introduction by virtually precluding the party from placing the grounds for his objection on the record. Therefore, as the record clearly reflects the contested items were never entered into evidence, we believe the Court of Appeals erred in holding the [evidence] was admissible.

Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 722 (1989).

Much of the written argument and documentation the Appellant references is hearsay, misleading, irrelevant, and conclusory, and would have been inadmissible. Had the Appellant properly moved to have the Hearing Officer make a ruling on the admissibility of her documents, such evidence would most likely have been excluded.

Further, it is clear that the Tribunal Panel reviewed the issue regarding the admission of these arguments and documents. The Panel found that, "although the [Appellant's] documents were not formally entered evidence by the hearing officer, the [Appellant] made several references to the documents during the hearing and she was permitted to testify and ask questions of the witnesses from the documents. Further, she did not request specific documents to be entered as exhibits during the presentation of her case." (Tribunal Panel Decision, mailed 10/25/2013). The Panel concluded by holding, "We find the [Appellant] was afforded a full, fair, and meaningful opportunity to present

her case. The Record was fully and fairly developed by the administrative hearing officer and is sufficient for us to render a fair decision. Reopening the Record in order to admit additional evidence as described in the [Appellant's] written Brief to the Appellate Panel is unnecessary and would not affect the outcome of this decision. Therefore, we find no cause to remand this case for further proceedings and the [Appellant's] request is denied. (Tribunal Panel Decision, mailed 10/25/2013).

In order to submit additional evidence, the evidence must be "shown to the satisfaction of the Court that the additional evidence is material and that there were good reasons for failure to present it in the lower proceeding. S.C. Code Ann. § 1-23-380(3) (2008). In the present situation, the Appellant has shown no good reason for her failure to introduce the evidence at the first proceeding. The fact that she is a lay person is not a sufficient reason. Further, the arguments and documents to which she refers were not material to the decision before SCDEW. SCDEW's Decision was based on the Appellant's calling Judge Simmons a liar and questioning his veracity. These are the basis for her termination and denial of benefits.

Lastly, the Appellant maintains that the Administrative Law Court erred by failing to strike the Statement of Facts in Oconee's Brief. The majority of the facts cited in Oconee's Brief were contained in the Record on Appeal. The remaining facts of which the Appellant objects were included in response to the Appellant's Brief which contained non-relevant conclusory statements, which were not in the Record. While Oconee County acknowledged that these facts were not relevant to the appeal, they were included in an attempt to address the improper issues and facts cited by the Appellant. Accordingly, these

facts were in response to the Appellant's Brief and had no bearing on the Decision of the Administrative Law Court.

In summary, the Appellant's contentions of denial of due process are without merit. The written arguments and documents Stewart desires to have made a part of the Record have no direct bearing on the issue of whether Stewart is entitled to unemployment benefits and are merely duplicative of arguments and evidence presented at the hearing. Stewart was terminated for questioning the truthfulness of Judge Simmons. While the exact wording is in dispute, it is clear that Stewart acknowledges she questioned Judge Simmons' truthfulness. Accordingly, the Appellant was terminated for misconduct and her attempts to submit this additional evidence, some of which dates back to 2011, is neither relevant nor material to the issue of her unemployment benefits.

- VI. THE ADMINISTRATIVE LAW COURT CORRECTLY HELD THAT THE RELIABLE PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD ESTABLISHED THE APPELLANT WAS TERMINATED FOR EMPLOYEE MISCONDUCT.**
- VII. THE ADMINISTRATIVE LAW COURT PROPERLY CONCLUDED THAT THE APPELLANT'S MISCONDUCT WAS FOR CAUSE AND IN ACCORDANCE WITH THE HANDBOOK.**
- IX. THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE SUPPORTS THE PANEL'S AND ADMINISTRATIVE LAW COURT'S FINDINGS THAT APPELLANT COMMITTED MISCONDUCT.**

The Appellant argues that SCDEW and the Administrative Law Court committed error in its Findings of Fact and Conclusions of Law. The Appellant states that there is direct documentary evidence and testimony presented to the Appeal Tribunal that she was terminated for filing a complaint of racial discrimination and/or whistleblowing and not for insubordination when she called Judge Simmons a liar. While the Appellant submitted

certain documents and testimony which she believes support this proposition, the overwhelming evidence establishes otherwise.

The Record is replete with testimony and documentary evidence that Ms. Stewart was terminated on May 9, 2013 by Judge Simmons for insubordination as a result of Stewart questioning Judge Simmons' truthfulness. While Stewart denies calling Judge Simmons a liar and maintains that she simply stated what he was saying "was inaccurate," this is not supported by the Record. Further, it is clear that in either event, the substantial evidence in the Record as a whole establishes the Appellant questioned Judge Simmons' integrity, motives, and his veracity in his courtroom. Such conduct by Stewart was clearly improper, contrary to what an employer has a right to expect, and misconduct connected with Stewart's employment.

While the Appellant disputes her exact wording and attempts to minimize her conduct, it is evident that the substantial weight of the evidence establishes that the wording used by the Appellant and her demeanor caused Judge Simmons to become quite upset. Judge Simmons testified the Appellant was terminated because she "called me a liar in my courtroom" on May 3, 2013. (TOR, p. 5, ll. 11-15). Judge Simmons explained that on May 3, 2013, he had called a meeting to discuss Stewart's transfer and reassignment to the Walhalla Court. The initial meeting was recorded. During the meeting, Stewart refused to be transferred and asked to go off the record to discuss something personal. During this unrecorded portion of the meeting, Stewart called Judge Simmons a liar. (Transcript of HR meeting held May 3, 2013, pp. 6, 18). A further review of the Record supports SCDEW's findings and conclusions.

Despite Stewart's allegations that she was transferred back to Walhalla for retaliation of a whistleblowing event, the Record reflects that Judge Simmons had ongoing discussions with County Administrator Moulder over a period of years as to how to properly staff the Court. It was ultimately determined that Judge Simmons' only option was to transfer Stewart back to the Walhalla Magistrate Court. (4 pages of Oconee County Administrative charts for fiscal year 2011-2012, TOR, p. 12, l. 23 – p. 13, l. 23, p. 14, ll. 3-18).

As a result, Judge Simmons requested a meeting with the Appellant and Sheriff. Judge Simmons anticipated that the Appellant would not want to be transferred and as a result, placed the conversation on the record. According to the Appellant, she evidently believed that this meeting was to discipline Ms. Sheriff. As the Appellant states in her Brief, the Appellant refused the transfer and asked to speak with Judge Simmons on a personal matter off the record. After Sheriff left the room and while off the record, Stewart called Judge Simmons a liar. When asked what was the exact language used by the Appellant, Judge Simmons testified as follows:

Hearing Officer: And, when you said that she called you a liar do you mean that she actually used the word "liar" directed at you or did she say something else that you construed to mean that she thought you were being deceptive?

Employer Witness – 2: She told me "You are a liar." Now, Ms. Stewart obviously contests that and when I terminated her on May 9th at Judge Norton's Court, she once again contested...or that's the first time she contested it was that I didn't call you a liar, I said that you were lying and that was, of course in front of Judge Norton and another Clerk. Now, it's being once again downgraded to that's not correct but to the best of my recollection I do specifically remember being told "You're a liar."

(TOR, p. 7, l. 27 – p. 8, l. 7).

Judge Simmons' recollection of the events is supported by both Sheriff's and Judge Norton's testimony. Sheriff testified that Stewart wanted to speak with Judge Simmons off the record and that when Judge Simmons came out of the private conversation with Appellant, she "could tell he was immediately upset at something and he walked to my office and said 'She just called me a liar.'" (TOR, p. 25, ll. 16-20). Judge Norton testified that during the termination meeting with Stewart and Judge Simmons on May 9, 2013, Stewart said, "I did not call you a liar, I said you lied," or something to that effect. (TOR, p. 29, ll. 1-3). Both of these witnesses' testimony support Judge Simmons' testimony about the May 3, 2013 meeting and do not support or establish Stewart's current version.

The Appellant also maintains that she was discriminated and retaliated against after she filed a complaint of discrimination by way of e-mail on May 9, 2013. The Appellant alleges that this e-mail is the cause of her termination and not the insubordination which occurred during the May 3, 2013 meeting with Judge Simmons. The evidence in the case shows otherwise. The evidence supports Judge Simmons' testimony that he wished to terminate the Appellant immediately following the May 3, 2013 meeting, but he had earlier made an agreement with Moulder that he would discuss any termination issues with him. There was also some concern over who had the legal authority to terminate the Appellant and whether she had the right to file a grievance.

The Appellant was hired as a Magistrate Clerk by Chief Administrative Summary Court Judge Simmons. As such, Stewart had a unique employment relationship. S.C. Code Ann. § 4-9-30(7) and South Carolina case law provide that an elected or appointed official has the ultimate responsibility of hiring and firing decisions related to their staff and that although counties may promulgate personnel policies applicable to all county employees,

it does not empower the county to make termination decisions. S.C. Code Ann. § 4-9-30(7) (2005); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001). Since Judge Simmons is an appointed official, he is ultimately responsible for hiring, staffing, and termination decisions of his staff. Judge Simmons' staff, however, are considered Oconee County employees. This relationship results in the unique situation wherein Stewart is an Oconee County employee, but Oconee County does not have the authority to hire or fire her. As a result of this blended employee relationship and in an effort to work together and avoid potential conflicts and problems, Judge Simmons and Moulder had agreed that Judge Simmons would discuss any termination decisions with Moulder prior to Judge Simmons actually terminating an employee. Judge Simmons testified that he had agreed with Moulder that he would not act without first consulting with the Administration. (TOR, p. 7, ll. 1-9, p. 12, ll. 15-22).

The evidence establishes that at the conclusion of the May 3, 2013 meeting, Judge Simmons told the Appellant he would consider what they had talked about during this meeting with his "intent being that Monday morning I would seek permission from the Administrator to terminate her for that comment." (TOR, p. 12, ll. 15-22). Even the Appellant acknowledges that she was placed on "disciplinary decision – making administrative leave." (Appellant's Brief, p. 28). While the Appellant attempts to minimize the reasons for the administrative leave, it is clear that the May 7, 2013 memo of Judge Simmons makes clear that the administrative leave was, in part, to determine whether or not she would be terminated for the inappropriate comments made to Judge Simmons. Judge Simmons' memorandum to Kay Olbon dated May 7, 2013 states that immediately after the meeting Stewart asked if she could speak with him about a personal matter. The

memo states that the Appellant had gone into Sheriff's desk and looked for various records pertaining to time sheets and then implied that Judge Simmons knowingly let Sheriff inaccurately record her hours and that Lisa Lee (hereinafter "Lee") had called Judge Simmons several weeks before to complain about the matter. Judge Simmons explained to Stewart that Lee had never called him and Stewart instantly stated to Judge Simmons, "You are liar." (Memorandum, dated May 7, 2013 from Judge Simmons). Thus, there is written documentation prior to May 9, 2013 evidencing that the Appellant called Judge Simmons a liar in his courtroom.

While Judge Simmons intended to talk with Moulder, unfortunately, Moulder was out of the office and involved in other County matters and it was several days before Judge Simmons was able to discuss the matter with Moulder. (TOR, p. 7, ll. 15-26). Since Judge Simmons had been unable to talk with Moulder, he reluctantly agreed to allow Stewart to continue her employment in Walhalla. After his discussion with Moulder and Moulder's clarification that Judge Simmons had the authority to terminate the Appellant, Judge Simmons informed Appellant of the termination decision.

Judge Simmons' testimony further explains why he did not immediately tell the Appellant he was terminating her and waited until May 9, 2013 to officially terminate Stewart for her insubordination. When asked by Hearing Officer Cook why he told the Appellant that he felt she had made the right decision regarding accepting the transfer and did not tell her he was seeking her termination, Judge Simmons responded that, "I really can't explain that other than I wanted her to feel comfortable because she was coming to Walhalla the following morning and I said that just... I can't tell you exactly why just words of comfort for lack of a better explanation." (TOR, p. 8, ll. 23-26). Thus, it is clear from

the substance of Judge Simmons' testimony that from the time of her calling him a liar, it was his intent to go straight to County Administration and ask for permission to terminate the Appellant. (TOR, p. 8, ll. 15-20). Judge Simmons' explanation provides a logical and rational explanation as to the delay in informing Stewart of her termination and is supported by the substantial evidence in the Record as a whole. This questioning also establishes that the Hearing Officer considered Stewart's arguments regarding retaliation in the termination decision.

Stewart argues that her termination was not for misconduct but for her claims of complaints of discrimination and retaliation. The substantial evidence in the Record does not support Stewart's allegations. Many of Stewart's complaints arose in 2011, shortly after she was hired. Once these incidents were brought to the attention of Judge Norton and Judge Simmons, Stewart's allegations were taken seriously and appropriately handled. While not relevant to this appeal, these personnel matters including the other employees were addressed. Because they were personnel matters, they were treated confidentially and not necessarily discussed with the Appellant. (TOR, p. 9, ll. 3-29). Had Judge Simmons, Judge Norton, or Oconee County intended to discriminate or retaliate against the Appellant for making claims of discrimination, they certainly could have done so during 2011, 2012, or prior to May 3, 2013. Instead, Stewart received positive reviews whereas other employees were counseled and monitored for job performance improvement.

The evidence establishes that despite Oconee's best efforts, the Appellant was unable to handle any form of criticism of her work performance. The Appellant continually alienated other employees and created discord in the workplace. Judge Simmons testified that he felt Stewart was becoming increasingly incapable of accepting constructive

criticism and that she had difficulty getting along with the other clerks. (TOR, p. 11, ll. 14-23). This explains in part the reasoning for placing the May 3, 2013 transfer meeting on the record and Judge Simmons' reluctance to directly confront Stewart following the meeting wherein she accused him of lying. It also provides some insight as to the conversation and reaction by the Appellant when she accused Judge Simmons of lying. Again, the Record supports the findings that the Appellant was terminated for misconduct and not some other reason.

Breed's testimony provides additional evidence supporting SCDEW's Findings of Fact and Conclusions of law. Breed stated that on May, 9, 2013, he was asked to work with Judge Simmons on this matter. Breed testified that Moulder had asked him to be involved in the situation and that it was Breed's understanding that Judge Simmons wished to terminate Stewart for calling him a liar. (TOR, p. 36, ll. 13-20). Breed stated that calling a superior a liar was something that would ordinarily result in an employee being discharged because it is blatant insubordination. (TOR, p. 36, l. 21 – p. 37, l. 1). Breed explained that it was his understanding that between May 3, 2013 and May 9, 2013, Judge Simmons had been trying to talk with Moulder but that it was a very busy time, in the middle of preparing the third reading of the budget. Moulder's schedule did not allow a meeting to occur and the first opportunity to meet occurred on May 9, 2013. At this time, the determination was made that Judge Simmons did indeed have the authority to carry out his earlier decision to discharge the Appellant. (TOR, p. 37, ll. 5-17). Again, Breed's testimony supports Judge Simmons' testimony and provides substantial evidence to support SCDEW's Decision.

The Appellant also alleges and argues her termination was not consistent with and was in violation of Oconee County's Employee Handbook. The Appellant's reliance on the Handbook is misplaced. While citing a portion of the Employee Grievance and Appeal Procedure, the Appellant ignores Policy No. 7-2 which states **"THIS POLICY IN NO WAY INFERS A CONTRACTUAL OBLIGATION TO FOLLOW ANY CERTAIN PROCEDURE AND THE COUNTY RETAINS THE RIGHT TO UTILIZE THE FORM OF DISCIPLINE IT DEEMS APPROPRIATE."** (Oconee County Employee Handbook, p. 59). Further, the section entitled "Termination Examples" clearly states "[t]here may be an occasion where an employee's performance, behavior, or conduct leads the County to conclude, in its sole discretion, that termination is appropriate." This paragraph cites certain examples including insubordination and refusal to perform assigned work. (Oconee County Employee Handbook, p. 60). Although the Appellant attempts to argue otherwise, there should be no question that calling your immediate superior, who is a Magistrate Judge, a liar and refusing a transfer constitutes insubordination. Again, the evidence submitted into the Record establishes that the Appellant was terminated for inappropriate conduct which is, in fact, consistent with Oconee County's Handbook.

In summary, the Record contains substantial evidence that the Appellant was terminated for cause. The testimony of the witnesses establishes that the Appellant initially refused the transfer and called Judge Simmons a liar. Further, the substantial evidence establishes that the termination was for cause and not in retaliation for the Appellant filing a grievance or whistleblowing complaint. The testimony of the witnesses and documentation support Judge Simmons' testimony that he intended to terminate the Appellant immediately following the May 3, 2013 meeting but wanted to discuss the matter

with Moulder before final action was taken. The delay and timing of the Appellant's termination had nothing to do with her grievance or whistleblowing complaint but solely the result of conflicting schedules and the need to thoroughly discuss the issue. Accordingly, SCDEW's and the Administrative Law Court's Decision should be affirmed.

VIII. THE ADMINISTRATIVE LAW COURT CORRECTLY HELD THAT THE APPELLANT HAD ABANDONED HER ARGUMENT AND THAT THE EVIDENCE DID NOT SUPPORT THAT APPELLANT WAS DENIED HER FIRST AMENDMENT RIGHT TO PURSUE THE GRIEVANCE.

Stewart alleges in her Brief that she made the comment regarding Judge Simmons' integrity in regards to a conversation regarding falsification of overtime records by another employee, Sheriff. Stewart contends that she has First Amendment protection rights related to her "whistle-blowing activity." The facts establish that the comment followed Stewart stating to Judge Simmons that "another clerk of mine [Lee] had called me and stated that Debbie [Sheriff] was putting down inappropriate overtime on her sheets." (TOR, p. 8, ll. 11-13). Judge Simmons denied that this conversation ever occurred and, at that point, Stewart called Judge Simmons a liar. (TOR, p. 8, ll. 11-13). It is important to understand by way of background that Lee denied making the allegations of inappropriate overtime and states that it was Stewart who accused Sheriff of falsifying overtime records.

The First Amendment does not protect all speech that a public employee may make. In *Garcetti v. Ceballos*, 547 U.S. 41 (2006), the United States Supreme Court held that when a public employee speaks pursuant to her official duties, she is speaking as a government employee and not as a citizen, and the First Amendment does not protect her speech from employer discipline. To state a First Amendment retaliation claim, a public employee must present evidence that: (1) her speech was protected by the First Amendment, (2) her speech has caused her to suffer a deprivation likely to deter free

speech, and (3) her speech was at least a motivating factor in the employer's action. *Massey v. Johnson*, 457 F.3d 711 (7th Cir. 2006). In the present situation, Stewart had previously made the allegations against Sheriff on several occasions. Stewart was not speaking as a private citizen when she once again brought up the potential misconduct by Sheriff to Judge Simmons' or when she told Judge Simmons he was lying. Instead, Stewart was speaking pursuant to her official duties and professional responsibilities. In doing so, Stewart had no protected First Amendment rights and no legitimately protected interest in calling Judge Simmons a liar. Accordingly, Stewart's allegations regarding her Constitutional rights must fail.

Further, in *Connick v. Myers*, the United States Supreme Court held in a decision with similar facts to the present case that a public employee's speech was not protected. In *Connick*, Myers, an Assistant District Attorney, was told that she was to be transferred to a different section of the criminal court. Myers told her supervisor that she opposed this transfer. After she was told that she was being transferred anyway, she distributed a questionnaire to 15 other Assistant District Attorneys. Myers' supervisor considered this an act of insubordination and fired her. The Court held that the First Amendment protects a public employee from employer retaliation when she speaks "as a citizen upon matters of public concern" but not when she speaks "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). The Court held that Myers' questionnaire concerned Myers' own dissatisfaction with her circumstances, which the Court considered private, not public. *Id.*, at 148–149. In the present situation, it is clear that the refusal to transfer to Walhalla was of personal interest which ultimately led to the Appellant calling Judge Simmons a liar. Both the initial conversation and the conversation

off the record centered around Ms. Stewart's refusal to be transferred back to Walhalla, despite Judge Simmons' assurances that the work environment had changed.

Similarly, Stewart claims that her transfer to Walhalla was in retaliation for her "whistle-blowing" e-mail of April 30, 2013 and that her termination was in part retaliation for the "whistle-blowing" statement she made regarding Sheriff during the off-record May 3, 2013 meeting. These allegations do not have merit. As the evidence establishes, Judge Simmons had numerous conversations with Moulder about Court staffing and the decision to transfer Stewart to the Walhalla office was made prior to the April 30, 2013 "whistle-blowing" e-mail. Further, the decision to terminate Stewart was the direct result of her calling Judge Simmons a liar. (TOR, p. 8 ll. 15-20). While she was not informed of this decision until May 9, 2013, her termination had nothing to do with her allegations against Sheriff or her self-serving e-mails between May 3 and May 9, 2013 containing inaccurate allegations and incorrect legal conclusions.

CONCLUSION

For the reasons set forth herein, Oconee County respectfully requests that this Court affirm the decisions of the Administrative Law Court and SCDEW in their entirety.

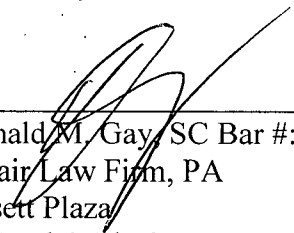
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SC Court of Appeals

Respectfully Submitted

February 20, 2015



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