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JUL 16 2015

SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Cynthia L. Aviles,

Appellant,

vs.

South Carolina Department of Employment
and Workforce, and Accusweep Services,
Inc.,

Respondents.

Docket No. 14-ALJ-22-0597-AP

**ORDER ON
RECONSIDERATION**

STATEMENT OF CASE

This matter is an appeal by Cynthia Aviles (Appellant) from a November 21, 2014 decision of the South Carolina Department of Employment and Workforce (Department) disqualifying Appellant from receiving unemployment benefits. The Department found that Appellant voluntarily left her employment without good cause attributable to the employment. On April 29, 2015, the Administrative Law Court (ALC or Court) issued an Order reversing the Department's decision. On May 12, 2015, the Department filed a Motion for Rehearing/Reconsideration and Memorandum in Support. The April 29, 2015 Order of this Court is hereby vacated and this Order is substituted therefor.

On appeal, Appellant argues that she never voluntarily quit her job. She was incarcerated and unable to contact her employer. Appellant further argues that even if she had contacted her employer, such an act would have been futile. The ALC has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2014). Upon consideration of the briefs and record, this Court reverses, finding that substantial evidence does not support the Department's decision.

BACKGROUND

Appellant worked at Accusweep Services, Inc. from August 12, 2013 to January 2, 2014, most recently as a street sweeper and blower. On January 3, 2014, Appellant called out of work. She was scheduled to work on January 4, 2014, but did not appear for that shift. On January 4, 2014, Appellant was arrested and charged with armed robbery. Appellant remained in jail until

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mid-May 2014, when the charges against her were dropped. Appellant asserts that while she was incarcerated her cell phone, which included Employer's contact information, was in police possession. Appellant testified that she was unable to contact anyone while she was in custody. She went on to explain that her family was not aware of her arrest or where she was working. Appellant testified that she contacted Employer immediately after she was released. Employer informed Appellant that her position had been filled, but encouraged her to reapply for any future openings. Appellant's testimony was corroborated by the Employer's testimony and the documentary evidence.

On August 5, 2014, Appellant filed a claim for unemployment benefits with the Department. On August 19, 2014, based upon reviewing the documentation submitted by the parties, the Department's Claims Adjudicator found Appellant left her employment without good cause and that she was therefore disqualified from receiving unemployment benefits under Section 41-35-120 of the South Carolina Code.

Appellant appealed the Claims Adjudicator's decision to the Department's Appeal Tribunal.¹ In a decision dated September 26, 2014, the Tribunal reversed the Claims Adjudicator's decision, finding that Appellant was separated from Employer for non-disqualifying reasons. Employer appealed the Tribunal's decision to the Department's Appellant Panel, which reversed the Tribunal's decision on November 21, 2014. In reversing the Tribunal's decision and agreeing with the Claims Adjudicator that Appellant voluntarily left without good cause, the Panel stated:

The record establishes that the claimant was separated after she failed to maintain contact with the employer. Contrary to the Appeal Tribunal, we do not find credible the claimant's assertion that she had no means of contacting the employer to notify them of her circumstances. We find the claimant abandoned her job when she missed multiple scheduled shifts without contacting the employer. Therefore, the claimant voluntarily quit without good cause attributable to the employment. The Appeal Tribunal decision is reversed.

This appeal followed.

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. 2014). Hearings before the Tribunal are held *de novo*. Regs. 47-51(C)(1).

ISSUE ON APPEAL

1. Did the Appellate Panel err in determining that Appellant should be indefinitely disqualified from receiving unemployment benefits because she voluntarily quit without good cause due to her inability to work while she was incarcerated?

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, 1-23-600(D) (Supp. 2014); 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. 2014). 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. 2014).

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

Appellant argues that the Appellate Panel’s finding that she voluntarily quit her most recent employment without good cause is erroneous in light of the evidence in the record. I agree.

Section 41-35-120 sets forth the eight specific grounds upon which an insured worker is ineligible for benefits. They include:

- Leaving work voluntarily;
- Discharge for misconduct connected with the employment;
- Discharge for cause, other than misconduct;
- Discharge for illegal drug use;
- Discharge for gross misconduct;
- Labor dispute;
- Receiving benefits elsewhere; or
- Voluntary retirement.

S.C. Code Ann. § 41-35-120 (Supp. 2014).

Here the Department’s decision, stating that Appellant “voluntarily quit without good cause attributable to the employment,” potentially implicates the first ground. There is no evidence in the record to support a finding that the employee left work voluntarily. The evidence is uncontroverted that the employee was prevented from attending work because she was imprisoned. A “voluntary” action is one “brought about by one’s own free choice; given or done of one’s own free will; freely chosen or undertaken.” Webster’s New World College Dictionary, 4th Ed. p. 1602. It is hard to imagine a situation in which an employee’s failure to appear for a scheduled shift would be less voluntary than when the individual is imprisoned. This court has recognized that “insurmountable commuting problems can constitute good cause where the problems are not due to any fault of the employee.” Ronnie Brunson v. SC Dept. of Employment and Workforce, 13-ALJ-22-0097-AP (Feb. 28, 2014) (citing 76 Am. Jur. 2d Unemployment Compensation § 118 (February 2015)). A more insurmountable commuting problem does not exist than being incarcerated for a crime one did not commit.

The evidence in this case shows that Appellant was discharged because she was unable to work due to her imprisonment. The substantial evidence on the whole record establishes the following undisputed facts: Appellant was arrested on January 4, 2014, the day that she was scheduled to work. Appellant provided an arrest warrant and other court documents to show her dates of incarceration, as well as the date the charges were dropped. She testified that she was unable to contact anyone while she was incarcerated for the next four months. Upon her release, Appellant immediately contacted Employer. There is no evidence in the record to contradict her testimony. At the Tribunal hearing, Employer's witness testified that Appellant was a good employee and that she had never missed a shift without contacting Employer. He went on to testify that, if a position became available, he would like to rehire Appellant.

The record does not contain any evidence that supports the Panel's finding that Appellant voluntarily abandoned her job. The Department argues that its finding that Aviles' testimony stating she was unable to contact her employer from prison was not credible is sufficient to support its decision. As discussed above, it is the Department's purview to make findings of fact, including determinations of witness credibility subject to this Court's review supported by "substantial evidence." In this case, even disbelieving that Appellant was unable to contact her employer from prison, a reasonable person could not conclude that Appellant voluntarily abandoned her job. Therefore, the undisputed facts of this case do not support a disqualification from benefits.

Appellant also argues that any efforts to communicate with her employer during her incarceration would have been futile because the employer would have replaced her before she could return to work with or without notice of Appellant's whereabouts. Because this issue was not raised before the Department it is not preserved for review. Brown v. S. Carolina Dept. of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002).

There is no evidence in the record in this case to show that Appellant voluntarily quit her employment. Rather, the evidence clearly shows that Employer discharged Appellant under circumstances that do not support a disqualification from benefits. Accordingly, the Court concludes that the Appellate Panel erred by determining that Appellant voluntarily quit her job without good cause. The Court finds that the Department's decision was clearly erroneous in light of the substantial evidence in the record.

ORDER

IT IS THEREFORE ORDERED that this Court's Order dated April 29, 2015 is **VACATED**.

IT IS ALSO ORDERED that the Appellate Panel's decision is **REVERSED**.

AND IT IS SO ORDERED.

A handwritten signature in cursive script, reading "Deborah Brooks Durden", written in black ink.

Deborah Brooks Durden
Administrative Law Judge

June 10, 2015
Columbia, South Carolina

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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

June 10, 2015
Columbia, South Carolina

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

RE: Cynthia L. Aviles v. SCDEW
Appellate Case No: 2015-001458

Dear Ms. Kitchings:

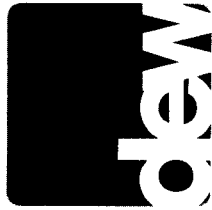
Enclosed is a copy of the Order on Reconsideration of Judge Durden in the above referenced case.

Please let me know if you have any questions.

Sincerely,

Kristi Chesley
Administrative Legal Assistant for
Trey McLeod
Assistant General Counsel

Cc: Christopher S. Leonard (w/o Enclosures)



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