THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge
Case No.: 14-ALJ-22-0597-AP

Appellate Case No. 2015-001458

Cynthia L. Aviles, Respondent,

v.

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

of whom, South Carolina Department of Employment and Workforce is Appellant.

INITIAL BRIEF OF APPELLANT

Debra S. Tedeschi (SC Bar # 15307)
Deputy General Counsel
E.B. "Trey" McLeod, III (SC Bar # 73642)
Assistant General Counsel
S.C. Dept. of Employment & Workforce
Post Office Box 8597
Columbia, SC 29202
(803) 737-2666
legal@dew.sc.gov
Attorneys for Appellant

Other Counsel of Record:

Christopher S. Leonard
Kendrick & Leonard, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186
chris@kendrickleonard.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUE ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN REVERSING THE DEPARTMENT'S DECISION THAT AVILES WAS INDEFINITELY DISQUALIFIED FROM RECEIVING UNEMPLOYMENT INSURANCE (UI) BENEFITS, WHICH WAS BASED ON THE DEPARTMENT'S FACTUAL FINDING THAT RESPONDENT LEFT HER MOST RECENT WORK VOLUNTARILY, WITHOUT GOOD CAUSE DUE TO HER INCARCERATION?

II. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY DECIDING AVILES WAS ENTITLED TO UI BENEFITS WHEN HER SEPARATION FROM EMPLOYMENT WAS A DIRECT RESULT OF BEING INCARCERATED FOR OVER FOUR MONTHS?

STATEMENT OF THE CASE

Aviles most recent employment prior to filing her unemployment insurance (UI) benefits claim was as a street sweeper/blower for Acuusweep, Inc., (Employer) from August 12, 2013, to January 2, 2014. (ALC Record p. 43-lines 8-9.). On August 4, 2014, Cynthia Aviles (Aviles) filed her UI claim with the South Carolina Department of Employment and Workforce (DEW or Department). (ALC Record pp. 4-10.). On August 19, 2014, the Department found that Aviles had left her employment without good cause, under the meaning of S.C. Code Ann. § 41-35-120(1), and that she was therefore disqualified from receiving UI benefits. See S.C. Code Ann. § 41-35-120(1)(Supp. 2014). (ALC Record p. 18.).

Aviles appealed the initial determination to the Appeal Tribunal (Tribunal) on August 26, 2014, pursuant to S.C. Code Ann. § 41-35-660. (ALC Record p. 19.). The Tribunal conducted an evidentiary hearing on September 24, 2014, where both Employer and Aviles participated. The resulting decision, issued on September 26, 2014, reversed the claims adjudicator's determination and held Aviles eligible for UI benefits without disqualification effective August 3, 2014. (ALC Record pp. 64-65.).

Thereafter, Employer filed an appeal to the Appellate Panel. The Appellate Panel reversed the Tribunal's decision and found Aviles had voluntarily left her employment without good cause attributable to her employment in a decision mailed November 21, 2014. (ALC Record pp. 1-3).

Aviles appealed the Department's decision to the South Carolina Administrative Law Court (ALC), and on April 29, 2015, the ALC issued an Order reversing the decision of the Panel. (ALC Order dated April 29, 2015.). On May 12, 2015, the

Department filed a Motion for Rehearing. (DEW Motion for Rehearing dated May 12, 2015.). On June 10, 2015, in its Order on Reconsideration, the ALC upheld its reversal of the Department's decision.

The Department timely filed a Notice of Appeal from the ALC's decision on July 7, 2015.

FACTS

This is a case where DEW determined that Aviles was indefinitely disqualified from receiving UI benefits because, as a result of being incarcerated for several months, she had abandoned her employment. Therefore, pursuant to S.C. Code Ann. § 41-35-120(1), DEW found Aviles had voluntarily left employment, **without good cause**, which in turn required an indefinite benefits disqualification.

Employer is a landscaping beautification and parking lot maintenance service. (ALC Record p.6). Aviles worked for Employer as a street sweeper/blower from August 12, 2013, to January 2, 2014. (ALC Record p.6; p.43-lines 8-9.). On January, 3, 2014, Aviles requested and was granted leave from work for that particular day. (ALC Record p.30-lines 16-17.)

At approximately 5:00 A.M. on January 4, 2014, Aviles was arrested and incarcerated for an incident unrelated to her work.[1] (ALC Record p.29, line 1p.30, line 34.). After her arrest, Aviles did not appear for work and failed to contact Employer. (ALC Record pp.32-33.) After waiting several days, and having no information regarding

[1] Aviles testified that she was arrested for armed robbery, but she had "nothing to do with it." (ALC Record p.31, lines 12-25).

Aviles's whereabouts or a possible return date, Employer considered Aviles to have left her job, i.e. voluntary resigned.[2] (ALC Record p. 43-lines 24-32).

Over four months later, in mid-May 2014, charges against Aviles were dropped and she was released from jail. (ALC Record p.6; p.38-lines 23-25.) It is undisputed that Aviles did not contact her Employer in any manner while incarcerated. Aviles asserted this was due to the fact that the police retained possession of her cell phone while she was incarcerated. (ALC Record pp.32-33.)

After being released from jail, Aviles did contact Employer, but Employer informed Aviles that she had been replaced due to her unavailability and there were no open positions for her. (ALC Record p.33, line 36-p.34, line 16; p. 44-lines 5-34).

On August 4, 2014, Aviles filed for UI benefits. (ALC Record pp.4-13). On her application for UI benefits, Aviles explained that she had been discharged because she was "considered a no-call no-show due to matters [she] could not control." (ALC Record, p.6). As to the final incident that caused her separation from employment, Aviles stated she was "being detained by the SC investigation unit for something [she] had no hand [in] or knowledge of which caused [her] to miss work for the next couple months[;] all charges were dismissed." (ALC Record, p.6). Employer responded to Aviles's UI claim and notified DEW that: (1) Aviles had "voluntarily quit;" (2) Employer had "available work;" and (3) no notice had been given. (ALC Record, p.14).

---

[2] Employer's witness stated as follows:

> I waited a couple of days to see if she would contact me. I asked on a regular basis had anybody heard from her and nobody had. So on [January] 6th I sent in the Employee Separation Notice for failed to return, no contact, **which we considered a voluntary resignation**.

(ALC R.p.43, lines 24-32) (emphasis added).

DEW initially found that Aviles had left her employment without good cause and indefinitely disqualified her from receiving benefits. (ALC Record p.18). Aviles appealed. At her hearing before the Appeal Tribunal, Aviles presented evidence that the charges against her for armed robbery had been dismissed. (ALC Record p.62). The evidence presented by both Aviles and Employer at the hearing was consistent.

The Appeal Tribunal reversed the initial adjudication and found Aviles eligible for benefits without disqualification. (ALC Record pp.64-65).

Employer timely appealed to DEW's Appellate Panel, which reversed the Appeal Tribunal, and reinstated the initial determination that Aviles was indefinitely disqualified from receiving UI benefits. Specifically , DEW found as follows:

> The record establishes [Aviles] was separated after she failed to maintain contact with the employer. Contrary to the Appeal Tribunal, we do not find credible [Aviles's] assertion that she had no means of contacting the employer to notify them of her circumstances. We find [Aviles] 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.

(ALC Record pp.1-3, Decision No. 2012-P-2156).

Aviles then appealed the decision of the Panel to the South Carolina Administrative Law Court (ALC). The ALC reversed DEW's decision that Aviles had left employment without good cause, finding instead that "the evidence clearly shows that Employer discharged [Aviles] under circumstances that do not support a disqualification from benefits." (ALC Order p.6, dated April 29, 2015).

DEW filed a Motion for Rehearing with the ALC. (DEW Motion for Rehearing dated May 12, 2015). The ALC vacated its Order dated April 29, 2015, but still reversed DEW's decision, finding that DEW erred when it determined Aviles had voluntarily quit

her job without good cause. (ALC Order on Reconsideration, dated June 10, 2015). In this second ALC order, the ALC stated:

> The record does not contain any evidence that supports the Panel's finding that [Aviles] 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 [Aviles] was unable to contact her employer from prison, a reasonable person could not conclude that [Aviles] voluntarily abandoned her job. Therefore, the undisputed facts of this case do not support a disqualification from benefits.

(ALC Order on Reconsideration p.5, dated June 10, 2015).

The ALC focused on whether Aviles's actions were "voluntary." (ALC Order on Reconsideration p.4, dated June 10, 2015). Comparing Aviles's incarceration to an "insurmountable commuting problem" that was not her fault, the ALC stated that "[i]t 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." (ALC Order on Reconsideration p.5, dated June 10, 2015).

Additionally, the ALC made its own finding that Aviles had been "discharged" because she was unable to work due to her detention. (ALC Order on Reconsideration p.5, dated June 10, 2015).

DEW timely filed an appeal with this Court, and this brief follows.

ARGUMENT

Standard of Review

DEW is an agency governed by the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

> [A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S.C. Emp. Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." Id. at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

> [S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984). Stated differently, substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

Furthermore, the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp. 2011). "The findings of the agency are presumed correct and will be set aside only if

unsupported by substantial evidence." Kearse v. State Health & Human Services Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Id.

I. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT DEW'S DECISION THAT AVILES LEFT HER MOST RECENT WORK VOLUNTARILY, WITHOUT GOOD CAUSE, DUE TO HER INCARCERATION, AND THEREFORE WAS INDEFINITELY DISQUALIFIED FROM RECEIVING UI BENEFITS.

The ALC inappropriately re-weighed evidence in this case and overturned a finding of fact made by DEW, namely that Aviles voluntarily left her employment without good cause. However, the substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. at 258, 315 S.E.2d at 375; see also Nucor Corp. v. S.C. Dep't of Emp. & Workforce, 410 S.C. 507, 517, 765 S.E.2d 558, 563 (2014) (where the S.C. Supreme Court recently recognized that even if it disagreed on the facts, it may not substitute its own "view of the evidence for that of the fact-finder" in a UI case).

Because there is substantial evidence to support DEW's findings, this Court should reverse. In other words, the evidence in this record clearly "would allow reasonable minds" to reach the same conclusion as DEW, which was that Aviles is not entitled to unemployment benefits because her job separation was without good cause. Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. at 366, 692 S.E.2d at 913.

A UI claimant is eligible for benefits only if she meets the statutory requirements, including that the claimant must have been separated from her employment "through no fault of [her] own." S.C. Code Ann. § 41-35-110(5) (Supp. 2014); see also Hyman v. S.C. Emp. Sec. Comm'n, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959) ("Where a claimant files an application for unemployment compensation benefits, the burden is upon such claimant to show that [she] has met the benefit eligibility conditions."). Indeed, the public policy underlying the entire UI statutory scheme is based on the premise that unemployment reserves are to be used only "for the benefit of persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20 (1986) (declaring public policy of South Carolina Employment and Workforce law on "involuntary unemployment").

The statute governing disqualification from UI benefits provides in pertinent part that an "insured worker is ineligible for benefits...[i]f **the department finds** [she] left voluntarily, without good cause, [her] most recent work." S.C. Code Ann. § 41-35-120(1) (Supp. 2014) (emphasis added).

The Legislature, thus, did not intend for the appellate courts to make new factual findings as to whether an UI claimant's separation constitutes a voluntary leaving, because under S.C. Code Ann. § 41-35-120(1), "this right is patently given to the [Department], whose duty it is to determine by the testimony and the evidence in each case whether certain facts existed." Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865, 871 (1942) ("The question as to whether a labor dispute existed in this case was a factual issue...by the express provisions of the Act, such findings are final."). Therefore, in the instant case, whether or not Appellant voluntarily left her job without cause or was

discharged from her employment is a factual determination for the Department to make, and not the ALC. See Goodwin v. BPS Guard Servs., Inc., 524 N.W.2d 28, 29 (Minn. Ct. App. 1994) ("Whether an employee quit or was discharged is a question of fact.")

Accordingly, the limited inquiry before this Court is whether substantial evidence supports a finding that Appellant left her employment voluntarily, without good cause. S.C. Code Ann. § 41-35-120(1).

The phrase 'without good cause' means without a cause attributable to, or connected with, employment. See State-Record Pub. Co. v. S.C. Emp. Sec. Comm'n, 254 S.C. 1, 9, 173 S.E.2d 144, 147 (1970); Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n, 219 S.C. 239, 247, 64 S.E.2d 644, 647 (1951).

Furthermore, the South Carolina Supreme Court has held that a UI claimant "may be charged with quitting a job by action **or inaction with unavoidable ramifications**." Samuel v. S.C. Emp. Sec. Comm'n, 285 S.C. 476, 477-78, 330 S.E.2d 300, 301 (1985) (emphasis added). Therefore, even when a claimant does not "affirmatively" quit, it is clear that for UI purposes, a claimant's own conduct or personal circumstances may cause her termination from employment, which in turn may be classified as voluntarily leaving without good cause, pursuant to S.C. Code Ann. § 41-35-120(1). Id.

This principle was made clear long ago when the South Carolina Supreme Court stated that nothing in the UI law "itself or in the circumstances surrounding its passage...indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give up [her] job solely because of a change in [her] personal circumstances." Judson Mills v. S.C. Unemployment Comp. Comm'n, 204 S.C. 37, 41, 28 S.E.2d 535, 536 (1944). Since the Court's ruling in Judson Mills, South Carolina

courts have consistently found that individuals who leave work for personal reasons unconnected to work must be disqualified from benefits. The Judson Mills Court astutely recognized that:

> Involuntary unemployment could obviously result from numerous causes. Sickness, accident, old age and changes in personal conditions and circumstances could result in a person becoming unemployed through no fault of his own as readily as lack of suitable work.

Judson Mills, 204 S.C. at 37, 28 S.E.2d at 536. However, our Supreme Court found that such "personal conditions" are **not** those which UI law intended to compensate. Id. ("It is obvious...from the provisions of the act that the term 'involuntary unemployment' as used therein had reference to unemployment resulting from a failure of industry to provide stable employment."); accord S.C. Code Ann. § 41-27-20 (1986) (declaring public policy of South Carolina Employment and Workforce law on "involuntary unemployment").

Turning to the instant case, the ALC improperly equated the question of whether Aviles "voluntarily" left work with whether she affirmatively acted with a specific intent to leave work.[3] Such an approach ignores South Carolina precedent which acknowledges that when a claimant's personal circumstances have "unavoidable ramifications," DEW may conclude that the claimant, for UI purposes, left employment without good cause, requiring an indefinite disqualification from UI benefits. See Samuel, supra; § 41-35-120(1).

[3] The ALC looked to Webster's Dictionary of "voluntary" to decide whether Aviles voluntarily left work without good cause under S.C. Code Ann. § 41-35-120(1). (ALC Order on Reconsideration p.4, dated June 10, 2015). The ALC failed to consider South Carolina precedent on this issue which recognizes that one need not "affirmatively" quit in order to be disqualified under Section 41-35-120(1). See Samuel v. S.C. Emp. Sec. Comm'n, 285 S.C. at 477-78, 330 S.E.2d at 301 ("Though not affirmatively quitting, it is clear appellant's own conduct caused her termination.").

Here, the substantial evidence in the record establishes that Aviles's arrest on armed robbery charges resulted in her incarceration for over four months, during which time Employer was not contacted in any way. Clearly, Aviles's own personal circumstances brought about her separation from employment, and, thus, the record here supports DEW's finding that she voluntarily left employment "without good cause," as contemplated in Section 41-35-120(1). See Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n, 219 S.C. at 247, 64 S.E.2d at 647.

In sum, by making a new factual finding regarding whether Aviles subjectively intended to leave her employment, rather than focusing on whether she left employment "without good cause," as that phrase has been interpreted under South Carolina precedent, the ALC improperly substituted its judgment for DEW's in contravention of the substantial evidence standard. Therefore, this Court should reverse.

II. THE ALC ERRED, AS A MATTER OF LAW, BY DECIDING AVILES WAS ENTITLED TO UI BENEFITS WHEN HER SEPARATION FROM EMPLOYMENT – DUE TO HER ABSENCE FROM WORK – WAS A DIRECT RESULT OF BEING INCARCERATED FOR OVER FOUR MONTHS.

It is a novel issue in South Carolina as to whether a prolonged absence from work caused by a claimant's incarceration constitutes conduct which supports a disqualification from UI benefits under Section 41-35-120. Other jurisdictions, however, have held that UI claimants are not entitled to benefits if they separated from work due to incarceration. Relying on these persuasive authorities, DEW believes the ALC erred, as a matter of law, in reversing DEW's decision to impose on Aviles an indefinite disqualification from receiving UI benefits.

In Fennell v. Bd. of Review, the New Jersey Supreme Court decided a case with similar facts as the instant case.[4] 688 A.2d 113 (N.J. App. Div. 1997). In Fennell, the claimant was arrested on several criminal charges while employed. He remained incarcerated for approximately nine months because he was unable to post bail. The claimant made efforts to get his employer to hold his job open until his release. However, after four months of him being absent for work, the employer informed the claimant that he had been separated from employment, but he could apply for a position upon release. Three days after his release, he applied for his old job, but was not rehired. The unemployment agency disqualified him from receiving UI benefits because his reason "for leaving his job was incarceration, a personal problem not attributable to work." Id. at 114. On appeal, the New Jersey appellate court affirmed the agency's decision and held:

> Here appellant's reason for leaving work was his personal problem, incarceration on criminal charges and his inability to raise enough money to post bail. **These unfortunate economic and legal problems were not related to his employment. Nor is an employee's intent to quit either relevant or controlling.... Appellant lost his job because of incarceration in default of bail. No matter how sympathetic the facts, this bore no relationship to his work.** The agency's decision to disqualify appellant from benefits because he voluntarily left his job without good cause attributable to work is supported by substantial credible evidence and is neither arbitrary nor capricious.

Id. 116 (emphasis added). The basis for the court's decision was its recognition that under New Jersey's UI law, "voluntariness of [a] quit simply concern[s] whether the employer forced the employee to quit." Id. at 115; see also Yardville Supply Co. v. Bd. of Review,

---

[4] The distinction between Fennell and the instant case is that the claimant in Fennell clearly evinced a specific intent not to quit his job, and yet was still held a voluntary quit within the purview of the statute. Unlike Aviles, Fennell made reasonable attempts to preserve his employment relationship by notifying the employer of his incarceration and asking that his job be held until his release. Here, Aviles remained absent from work for four months and made **no contact** with Employer.

Dep't of Labor, 554 A.2d 1337, 1339 (N.J. 1989) ("in general an employee is disqualified from receiving unemployment benefits under [the disqualification statute] if he makes a 'departure not attributable to work.'").

Similarly, the Georgia Court of Appeals rejected a claimant's assertion that his inability to report to work due to incarceration was "totally involuntary and not the result of his own fault." Carter v. Caldwell, 261 S.E.2d 431 (Ga. Ct. App. 1979). In affirming the denial of his claim for benefits, the court held that when "an employee engages in conduct which leads to his incarceration, and as a result of his incarceration he is dismissed from his employment, the denial to him of unemployment compensation is the correct interpretation of the statutory mandate." Id.

Like the courts in New Jersey and Georgia, an appellate court in New York found substantial evidence supported the unemployment agency's decision that a claimant voluntarily left work without good cause, "notwithstanding claimant's unsuccessful attempts to contact the employer by telephone while he was in jail and his belated request for a leave of absence when he was released." In re Richardson, 30 A.D.3d 870, 871, 816 N.Y.S.2d 688, 689 (2006).

Several other jurisdictions routinely deny UI claims where incarceration causes an absence from employment, regardless of whether the separation from employment is found by the unemployment agency to be a quit without good cause or a discharge due to misconduct. See, e.g., Bivens v. Allen, 628 So.2d 765 (Ala. Civ. App. 1993); Johnson v. Dep't. of Indus. Rel., 447 So.2d 747 (Ala. Civ. App. 1984); Sherman/Bertram, Inc. v. California Dep't. of Emp., 202 Cal.App.2d 733, 21 Cal.Rptr. 130 (1962); Kentucky Unemployment Ins. Comm'n v. Stirrat, 688 S.W.2d 750, 752 (Ky. Ct. App. 1984) (the UI

claimant's absence due to incarceration and his "corresponding failure to notify the employer of his absence, constituted the requisite misconduct under the language of the statute"); Alexander v. Michigan Emp. Sec. Comm'n, 144 N.W.2d 850 (Minn. Ct. App.1966); Smith v. American Indian Chem., 343 N.W.2d 43 (Minn. Ct. App.1984); Medina v. Com., Unemployment Comp. Bd. of Review, 55 Pa. Cmwlth. 323, 327, 423 A.2d 469, 471 (1980) ("claimant was discharged for his extended absence, not for his criminal activity. Thus, his incarceration and not his criminal conduct *per se*, rendered claimant unable to perform his job, and his incarceration supports a finding of willful misconduct.").

The Minnesota Court of Appeals explained the policy of denying UI benefits when the job separation was caused by absence from work due to incarceration as follows:

> To grant [claimant] benefits would undermine the state policy of using unemployment reserves for the benefit of persons unemployed through no fault of their own. Absence from work due to incarceration for criminal acts is misconduct sufficient to disqualify an employee from receiving unemployment compensation benefits.

Smith v. Am. Indian Chem. Dependency Diversion Project, 343 N.W.2d at 45-46.

A comparison of the foregoing cases from other state jurisdictions on incarceration to the South Carolina cases cited above, see Samuel, and Stone Mfg. Co., leads to the conclusion that Section 41-35-120(1) does not allow DEW to grant UI benefits to individuals who were separated from their jobs because they were in jail or prison.

In sum, while it may appear that Aviles did not **intend** to abandon her employment, her own personal conduct and circumstances led to her incarceration, which

in turn led to her employment separation. Under South Carolina precedent, she is not, as a matter of law, eligible for unemployment insurance benefits.

CONCLUSION

For all the reasons discussed above, the decision of the ALC should be reversed.

Respectfully submitted,

Debra S. Tedeschi (SC Bar # 15307)
Deputy General Counsel
E.B. "Trey" McLeod, III (SC Bar # 73642)
Assistant General Counsel
S.C. Dept. of Employment & Workforce
Post Office Box 8597
Columbia, SC 29202
(803) 737-0395
legal@dew.sc.gov
Attorneys for Appellant

October 2, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 14-ALJ-22-0597-AP

Appellate Case No. 2015-001458

Cynthia L. Aviles, Respondent,

v.

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

Of whom, South Carolina Department of Employment and Workforce is Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on October 2, 2015, to the following addresses:

Christopher S. Leonard
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
Attorney for Respondent

Accusweep Services, Inc.
c/o Homer Mask Consultant Services
P.O. Box 21456
Columbia, SC 29221
Employer-Defendant

Kristi Chesley
Kristi Chesley
Administrative Legal Assistant for
Debra S. Tedeschi
E.B. "Trey" McLeod, III
Attorney for SCDEW
Legal@dew.sc.gov

October 2, 2015