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SC Court of Appeals

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. AvilesRespondent,

v.

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

Of whom, South Carolina Department of
Employment and Workforce isAppellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AVILES VOLUNTARILY QUIT
- II. THE QUESTION OF AVILES DISQUALIFICATION DUE TO INCARCERATION IS NOT PRESERVED FOR REVIEW, ALTERNATIVELY DISQUALIFICATION IS NOT APPROPRIATE WHERE AVILES WAS INCARCERATED THROUGH NO FAULT OF HER OWN

STATEMENT OF THE CASE

Cynthia Aviles, a street sweeper for Accusweep Services, Inc., was arrested without probable cause and held in the county detention center for nearly five months. Aviles was unable to communicate with her employer while being detained. As soon as the charges against Aviles were dismissed and she was released, she called her employer. Accusweep Services informed Aviles her position had been filled.

Aviles applied a UI claim. The Department of Employment and Workforce found she voluntarily quit her job because of her failure to communicate with her employer despite a lack of any substantial evidence supporting the failure was voluntarily.

STATEMENT OF THE FACTS

On August 1, 2013, Cynthia Aviles began her job with Accusweep Services, Incorporated. On January 4, 2014, Aviles was arrested in Richland County on a charge of Armed Robbery. Because of the arrest, Aviles was transported to the Richland County Detention Center where she remained until the case was dismissed for lack of probable cause against her in May.

While Aviles was detained, she was unable to access her cell phone which contained the number for Accusweep. Nor was she able to communicate with family who could have called Accusweep on her behalf. When Aviles did not show up for work for a couple of shifts, Accusweep assumed she had quit and filed termination papers.

Accusweep Services, Inc. confirmed at the Appeal Tribunal Hearing the only reason Aviles no longer worked for them was because she did not show up for work after she was arrested.

After the initial denial of benefits, the Tribunal held Aviles was eligible for benefits finding Aviles was separated for non-disqualifying reasons. Accusweep Services, Inc. appealed the Tribunal's decision. The Appellate Panel reversed the Tribunal's decision finding Aviles was not credible when she claimed she was unable to maintain contact with her employer.

Aviles appealed to the ALC arguing there was no substantial evidence supporting the Appellate Panel's findings, the ALC agreed and reversed the decision.

ARGUMENT

III. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AVILES VOLUNTARILY QUIT

The ALC was correct in determining the Appellate Panel erred in finding Aviles voluntarily quit her job without good cause in light of the substantial evidence in the record. The Appellate Panel's finding was unsupported by substantial evidence. Without reference to specific findings, the Appellate Panel decided the issue on the credibility of Aviles' assertion that she had "no means of contacting her employer to notify them of her circumstances." Reasonable minds considering the evidence before the Department could not reach the conclusion that the Department reached.

The ALC must affirm the [Panel] if there is substantial evidence, which is more than a mere scintilla of evidence but is something less than the weight of the evidence, to support the [Panel's] determination. *McEachern v. S.C. Empl. Sec. Comm'n*, 370 S.C. 553, 561 (Ct. App. 2006). The ALC was mindful of its limited scope of review. The ALC opinion noted "it is the Department's purview to make findings of fact, including determination of witness credibility." (ALC Order June 10, 2015) However, the ALC was unable to find any evidence at all that would lead a reasonable person to conclude Aviles voluntarily abandoned her job.

In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Friends of the Earth v. PSC of S.C.*, 387 S.C. 360, 366 (2010). Under 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." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130 (1981).

There is nothing in the record containing "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Aviles could have communicated with her

employer. *South Carolina Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281 (1987). Further, there is no evidence in the record to attack Aviles' credibility as a witness. Nearly every aspect of Aviles' testimony was supported and confirmed either by documentation or testimony from her employer, nothing was contradicted. Even the Hearing Officer who had the direct ability to view Aviles determined her testimony to be truthful. "It is logical for the [Appellate Panel], which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64 (1967).

Aviles is aware the Department is the "sole fact-finder [and] ... any questions of credibility must be resolved" by the Department. *Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 501, (Ct. App. 1997). However, even questions of credibility must be supported by substantial evidence. See *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76 (Ct. App. 2009)(the Commission's order was clear the lack of credibility was due to claimant's conduct and inconsistent statements).

In this case, the Appellate Panel gave no support as to why it found Aviles "assertion that she had no means of contacting the employer to notify them of her circumstances." (ALC Record p.2). Findings of the Appellate Panel must be supported by substantial evidence, even a finding against credibility. A review of the entire record would not lead a reasonable person to conclude Aviles voluntarily abandoned her job due to not communicating with her employer.

The Department makes the argument the ALC is unable to reach a determination a claimant left her previous employer different from that of the Department. This argument is in stark contradiction with South Carolina law. The ALC reviews the Department's decisions in its appellate capacity "as prescribed in [South Carolina Code] Section 1-23-380." *Stubbs v. S.C. Dep't of Empl. & Workforce*, 407 S.C. 288 (Ct. App. 2014). Under the statute the ALC may "reverse or modify the decision if substantial rights of the appellants have been prejudiced because the administrative findings, inferences, conclusion, or decisions are ... clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code 1-23-380(5).

Therefore, since the ALC found the administrative finding was clearly erroneous, the ALC correctly reversed the Department's decision.

The Appellate Panel's decision should be reversed due to a lack of substantial evidence supporting the decision. Since there was no evidence to support the Appellate Panel's determination of voluntarily abandonment, there was no disqualification under § 41-35-120 and the ALC correctly reversed the Appellate Panel's order.

IV. THE QUESTION OF AVILES' DISQUALIFICATION DUE TO INCARCERATION IS NOT PRESERVED FOR REVIEW, ALTERNATIVELY DISQUALIFICATION IS NOT APPROPRIATE WHERE AVILES WAS INCARCERATED THROUGH NO FAULT OF HER OWN

The Department asks this Court to rule incarceration, even incarceration for charges dismissed, excludes payment under UI as a matter of law. This issue was raised by the Appellate Panel nor was before the ALC. The brief of the Department addressed two concise issues. First, the Department briefed the issue if there was substantial evidence in the record to affirm the Appellate Panel's finding. Second, that Aviles' argument on futility of communication was unpreserved since it was not raised and ruled upon by the Panel. Not until the Department's motion for rehearing/reconsideration was this argument raised. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (1998). The issue was not discussed in the Appellate Panel's decision nor either party's brief in the ALC. A motion for rehearing is not a vehicle to allow aggrieved parties to make new arguments and get a second bite at the apple. This Court should find the issue not properly before and not reach the issue but rather should confine the issue on appeal to the determination there was not substantial evidence to affirm the Appellate Panel's decision.

The Department argues Aviles quit her job by action or inaction with unavoidable ramifications. The Department cites *Samuel v. S.C. Emp. Sec. Comm'n*, 285 S.C. 476 (1985). In

Samuel, the employee was put on notice that she had to request a leave of absence by a certain date and she failed to make this request. The court reasoned “[t]hough not affirmatively quitting, it is clear appellant’s own conduct caused her termination.” *Id* at 477-478. In the present case, Aviles’ personal conduct had no reasonable consequence of termination. She committed no crime leading to her incarceration nor is there any evidence to support a contention she was able to contact her employer.

The Department argues the unlawful incarceration of Aviles raises the “change in personal circumstances” exclusion citing *Judson Mills v. S.C. Unemployment Comp. Comm’n*, 204 S.C. 37, 41 (1944). The 1944 *Judson Mills* opinion, notes that “[s]ickness, accident, old age and changes in personal conditions” are potential reasons a person might be involuntarily unemployed but would not qualify for UI benefits. The facts in Aviles case are different. There are, of course, unavoidable consequences of the human condition that apply to us all. While there may be some beneficial reason to allow for UI benefits in these situations, *Judson Mills* opinion is clear this was not the intent of the UI legislation. However, being wrongfully imprisoned by the State is neither unavoidable aspect of life nor a reasonable possibility for American citizens. It is unreasonable and not the normal change in personal conditions that *Judson Mills* implicates.

Finally, the Department asks this Court rule that separation from work due to incarceration is a disqualification for UI based on case law from other states. While the Department cites eleven cases supporting this assertion, ten of the cases are distinguishable on their face due to the claimants being convicted of the crime that lead to incarceration. See *Yardville Supply Co. v. Bd of Review Dep’t of Labor*, 554 A.2D 1337 (1989) (“convicted of driving while intoxicated”); *Carter v. Caldwell*, 261 S.E.2d 431 (Ga. Ct. App. 1979) (“incarceration following conviction of a crime”); *In re Richardson*, 30 A.D.3d 870 (2006) (“as a result of probation violation”); *Bivens v. Allen*, 628 So.2d 765 (Ala. Civ. App. 1993) (“arrested for nonpayment of traffic tickets”); *Johnson v. Dep’t. of Indus. Rel.*, 447 So.2d 747 (Ala. Civ. App. 1984) (“claimant’s driving under the influence was a voluntary act”); *Sherman/Bertram, Inc. v.*

California Dep't of Emp, 202 Cal.App.2d 733 (1962)("involved in a hit and run accident and... sentenced to 30 days"); *Kentucky Unemployment Ins. Comm'n v. Stirrat*, 688 S.W.2d 750 (Ky. Ct. App. 1984)("driving while intoxicated...sentenced to serve 30 days); *Alexander v. Michigan Emp. Sec. Comm'n*, 144 N.W.2d 850 (Minn.Ct.App 1966)(charged with assault and battery, and sentenced to 60 days in jail); *Smith v. American Indian Chem.*, 343 N.W.2d 43 (Minn Ct. App. 1984)("arrested for failure to pay a speeding ticket); *Medina v. Comm. Unemployment Comp. Bd. Of Review*, 55 Pa. Cmwlth 323 (1980) (sentenced to six months in prison).

Aviles does not argue that actions committed voluntarily that cause arrest and abandonment of employment should not be attributable to a claimant and require UI disqualification. As held in the *Carter* case, 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." *Carter* at 688. These cases are not relevant to this issue of a person who is innocent and arrested through no fault of their own.

The declared public policy is clear that the "compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed *through no fault of their own*. S.C. Code 41-27-20 (with emphasis added). Aviles did not voluntarily leave her position at Accusweep Services. Aviles was arrested without probable cause. She was handcuffed by the police, questioned and finally detained in connection with an armed robbery. Aviles maintained her innocence throughout the entire process. Aviles was held in the Richland County Detention Center for four and a half months on an unreachable \$100,000 bond. While being detained she was beaten up and assaulted by a correctional officer.

It is common knowledge that during the arrest process, a person's personal property is taken by the arresting officer. Aviles' personal property contained her cell phone which included her employer's contact information. Aviles was unable to call her employer. In fact, she "could not

get in touch with anyone.” (ALC Record p.32). Her family was unaware of her situation, nor were they aware she was working at Accusweep Services, Inc. (ALC Record p.33). Not until after the indictment was “No-Billed” and Aviles was released, was she able to contact her boss, which was the “first thing” she did when she got out of jail. (ALC Record p.34). When Aviles was finally released and able to communicate with her boss, she was informed her position had been filled. (ALC Record p.33).

At the Tribunal Hearing, Fred McCaskill, manager of Accusweep Services, Inc., confirmed the only reason Aviles no longer worked for him was because she failed to show up for work after her arrest. When asked if she was otherwise a good employee, McCaskill responded “oh absolutely.” (ALC Record p.43). McCaskill also confirmed Aviles contacted him after she was released, told him about the arrest, and that he informed her the position was already filled. (ALC Record p.44). McCaskill told the Hearing Officer that if he had a position available he would be willing to hire her back. (ALC Record p.45).

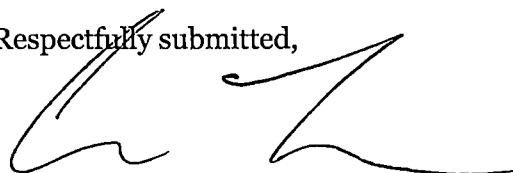
There is disagreement concerning this issue in other states. *See Moore v. Swisher Mower & Mach. Co.*, 49 S.W.3d 731 (Mo. Ct. App. 2001) (finding innocent incarceration not a disqualifying reason); *Fennell v. Bd. of Review*, 688 A.2d 113 (Super. Ct. App. Div. 1997) (finding innocent incarceration a disqualifying reason). However, in determining good cause on a case-by-case basis, a reasonable person could not conclude that being held in jail while innocent of a crime could constitute leaving work voluntarily.

CONCLUSION

The Administrative Law Court correctly reversed the Department’s decision denying unemployment benefits to Cynthia Aviles, a South Carolina worker, because the decision is unsupported by substantial evidence. The Department’s claim that Aviles is ineligible for benefits due to innocent incarceration is not preserved for review because the Department only made this argument in its motion for rehearing. This Court should dismiss the Department’s appeal, affirm

the Administrative Law Court's Order and find Aviles eligible for unemployment benefits without disqualification.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Leonard', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the attached *Initial Brief* and *Designation of Matters* has been served on the opposing counsel, via United States Postal Service at the following address, this 4th day of January, 2016:

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