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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF BARNWELL<br><br>ARCHIE PATTERSON AND TAMI BOLLERMAN,<br><br>PLAINTIFFS,<br><br>v.<br><br>SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE,<br><br>DEFENDANT. | IN THE COURT OF COMMON PLEAS<br>SECOND JUDICIAL CIRCUIT<br><br>CIVIL ACTION NO.: 2013-CP-06-059<br><br>ORDER FINDING THAT NAMED PLAINTIFFS TAMI BOLLERMAN AND ARCHIE PATTERSON HAVE STANDING TO REPRESENT THE PUTATIVE CLASS |





**PROCEDURAL HISTORY**

This matter is before the court on Defendant South Carolina Department of Employment & Workforce's (SCDEW) Motion for Re-Hearing of the Court's Order Certifying Class in the above captioned matter. Named Plaintiffs allege on behalf of themselves, as well as the putative class, that they were wrongfully denied unemployment insurance benefits by SCDEW. SCDEW is a State Agency charged by the South Carolina Legislature with the duty of processing unemployment claims in accordance with the Laws of this State. In order to be eligible to receive unemployment benefits, a claimant must be able to work and be seeking work. On a weekly basis, claimants have to comply with the process established by SCDEW for making claims. On August 6, 2012, without first promulgating regulations, SCDEW changed its method for claimants demonstrating that they were looking for work. SCDEW began to require claimants to file at least one online application seeking employment. The named Plaintiffs were denied benefits because of their inability or failure to properly apply online for employment. No other reason was given for denial of benefits. Plaintiffs assert that SCDEW is required by statute to implement regulations to

establish policies to pay claims for unemployment benefits, in particular South Carolina Code Ann §41-27-510, §41-35-610, and §1-23-10 et. seq., which independently require the agency to promulgate regulations. Alternatively, Plaintiffs assert the new policy constitutes a binding norm which must be implemented by regulation under the APA. *See Joseph, et al v. SCDOL, et al*, Appellate Case No. 2014-001115, Opinion No. 27666. (Heard February 19, 2015 – Filed September 14, 2016).

Named Plaintiffs seek to represent a class defined as all persons who are citizens and residents of South Carolina who are eligible for unemployment insurance (UI) benefits but have not received payment due to Defendant's requirement they make an online application for work as a prerequisite to receiving benefits. Following a hearing on Plaintiffs' Motion to Certify the Class, the Court issued an order on April 29, 2016 certifying the class and finding that the named Plaintiffs had standing to bring the action. Defendant moved for reconsideration. Hearings were held to take testimony, the first on November 2, 2016, and the second on January 11, 2017.

**PLAINTIFFS TAMI BOLLERMAN AND ARCHIE PATTERSON HAVE STANDING TO BRING THIS ACTION AND REPRESENT THE PUTATIVE CLASS**

Tami Bollerman and Archie Patterson each have individual standing to bring this action. Tami Bollerman lost her job after being put on bed rest during her pregnancy. She began receiving unemployment benefits in August of 2012 and successfully applied for and received those benefits until the week ending October 13, 2012. During that week, SCDEW's computer system indicated that she failed to do one of four work searches online. Ms. Bollerman testified that she did, in fact, do an online search for that week, but speculated that she may have taken a link away from the SCDEW online work search site. Despite this, her claim was still denied. She ultimately received two more weeks of unemployment benefits before finding work. Ms. Bollerman did not exhaust

her unemployment benefits and was still eligible for one or more weeks of benefits when she became employed.

Archie Patterson was terminated from his employment with the South Carolina Department of Corrections on May 28, 2012. On June 12, 2012, he was determined to be eligible for unemployment compensation up to a maximum of $6,520.00. SCDEW determined that he was eligible for benefits and began paying those benefits in August of 2012. In the first week, Mr. Patterson was confronted with the online work search and lost a week of benefits for failing to perform the search. Mr. Patterson explained at the hearing on this matter that he was not proficient with computers and therefore had difficulty with the online application. After losing that week of benefits, he testified that he had his son help him learn to do the online work search. Mr. Patterson continued to receive state benefits until his they were exhausted. Mr. Patterson then received one week of federal unemployment benefits, which a continuation of state benefits and therefore should be paid continuously until exhausted. When he stopped receiving his benefits they had not been exhausted.

In arguing that Plaintiffs lack standing, Defendant asserts that both Tami Bollerman and Archie Patterson did not appeal the adjudication of their benefit loss through administrative channels and have therefore failed to exhaust administrative remedies. SCDEW has an appeals process which eventually leads to the Adminstrative Law Court. A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)). The Administrative Law Court is part of the executive branch. *See, e.g., Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Because an

Administrative Law Judge is an agency of the executive branch, "it must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation." *Id.* at 38, 535 S.E.2d at 644. At the hearing, Chief Administrative Hearing Officer Ms. Romi Robinson admitted that a hearing officer would not have the authority to rule on whether requiring on-line searches could be required without SCDEW promulgating regulations regarding on-line searches. Therefore, any appeal concerning whether Plaintiffs were required to complete an online job search would be futile, since by its own admission the hearing officer could not rule on this issue.

The Administrative Law Court has "no authority to rule on the facial validity" of a regulation under state law. In *Drummond*, the Plaintiff filed suit stating that the South Carolina Department of Revenue "improperly promulgated regulations that do not conform to [statute] because the regulations allow the sales tax exemption only for diabetic supplies sold pursuant to a prescription or written authorization, which appellant claims is not required under the statute." *Drummond v. State, Dep't of Revenue*, 378 S.C. 362, 365, 662 S.E.2d 587, 588 (2008). The Court held that: "Although appellant is not challenging the constitutionality of the regulation, he *is* challenging its validity under state law. Because the Administrative Law Court is part of the executive branch, as stated in *Video Gaming*, it has no authority to rule on the facial validity of Reg. 117-332." *Id.* at 370, 662 S.E.2d at 591.

In addition to that, the Court of Appeals, in dicta, recently stated that "[a]nother exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." *Brown v. James*, 389 S.C. 41, 55, 697 S.E.2d 604, 611-12 (Ct. App. 2010). Other courts have held that an exception to the exhaustion of administrative remedies requirement exists when an agency has acted outside its authority. *See, e.g.*, *Grever v. Idaho Telephone Co.*, 499 P.2d 1256, 1259 (Ida.

1972) ("[T]he rule will be departed. . . where the agency acts outside its authority."). Because the plaintiffs are alleging that the SCDEW "acted outside its authority," a court should hold that they did not need to exhaust administrative remedies. By requiring exhaustion of administrative remedies, the court would force a member of the executive branch, the ALC, determine the validity of a policy of another member of the executive branch; thus, it would violate the separation of powers doctrine. *See Ward v. State*, 343 S.C. 14, 20, 538 S.E.2d 245, 248 (2000) (Because an agency is part of the executive branch, "requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.").

The Plaintiffs here are seeking a determination that SCDEW's policy requiring online searches was unlawful. The administrative courts, as a part of the executive branch, cannot determine that issue and therefore the issue can only be addressed in circuit court.

Defendant also argues in the case of Archie Patterson that he has mooted his claims or failed to mitigate his losses by failing to apply for benefits. Even if Mr. Patterson chose not to apply for benefits after he was denied benefits that does not cure or obviate any earlier wrongful denial of benefits. Therefore Mr. Patterson's claim is not moot and he has not failed to mitigate damages.

Even if Mr. Patterson and Ms. Bollerman lacked individual standing as alleged by SCDEW, they still have standing to represent the class under two distinct legal theories. The South Carolina Supreme Court has recognized that even when a plaintiff lacks standing to bring an action, they may still have standing if the harm they suffered is capable of repetition but evading review. *Byrd v. Irmo High School*, 321 S.C. 426 (1996). In that case, a student challenged his suspension from school and Irmo High argued that the case was moot because he was no longer under the suspension by the time the case was heard. The court held that when a case involves an issue that

is capable of being repeated but can become moot before a court can decide it, an exception to the mootness doctrine exists. Here, one of the named Plaintiffs has, according to the Defendant, suffered a loss of benefits in a given week, and later failed to apply for benefits during a week when he might have recovered the lost week.

The design of unemployment benefit (UI) payments in South Carolina causes plaintiffs who are unemployed long enough to exhaust weeks of their benefits and potentially moot their own claims. The maximum length of the UI payment period in South Carolina is technically 20 weeks, but more often than not it is less. Therefore, many individual plaintiffs are incapable of maintaining their standing for the multiple years that such a case can take to complete. The issue in this case is capable of repetition but evading review.

The second exception to the mootness doctrine is the public importance exception. *Sloan v. Greenville County*, 361 S.C. 568, 606 S.E.2d 464 (2004). Under that exception, a case must present "imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters of important public interest.'" *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (*citing Sloan v. Greenville County*). The exception was established in South Carolina in the case of *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947). In that case, the Supreme Court of South Carolina, having already resolved the controversy between the parties by holding appointments to a board invalid, turned anyway to the matters in the case that it deemed of public importance. *Ashmore* at 96. "Questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest." *Id.* at 96. In a more recent case involving the public importance exception, the Supreme Court found it did not exist in a case involving federal and state preemption of zoning ordinances, applicability of zoning ordinances, and tort

liability because the case presented "no issue of the constitutionality or legality of government action." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). Here, the only question for this Court is whether or not SCDEW is legally entitled to require the online work search as a prerequisite to benefits. This question can be resolved in a class action as already determined by this Court in its Order Certifying Class.

More recently, in *South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), the court found a public importance exception in a case involving the composition of a board which was established by statute. The statute, S.C. Code Ann. § 11-43-140 (2011), places two members of the General Assembly onto the board allegedly in violation of the dual office holding provisions of the South Carolina Constitution. The court held that even where the Plaintiff did not assert a particularized injury he still had standing because the case presented a "colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board," and therefore fit into the public importance exception.

Here both individual Plaintiffs testified about the difficulties faced by unemployment insurance recipients in losing even a single week of benefits as a result of the online work search requirement. Similarly, John Ruoff, after being qualified as an expert witness, testified about general hardships faced by recipients of unemployment insurance who are relying on those checks as a sole source of income while they search for employment. Ruoff further testified that the very purpose of Unemployment Insurance is to ameliorate the effects of losing a job.

Here, before this Court, is a matter of great public interest. SCDEW claims, as a matter of law, that a budget proviso of the General Assembly directing it to spend certain monies on implementing an online work search requirement not only entitles, but requires the agency to

design and implement such an online search requirement and to do so without any legislative oversight or input. As argued repeatedly by the Plaintiffs throughout the course of this litigation, that claim is erroneous under both the APA and SCDEW's own enabling legislation. Nonetheless, SCDEW has steadfastly enforced the online search requirement, with brief interruption, since the budget proviso was passed. Even if the court were to decide that the Plaintiffs do not have individual standing, the issue itself is important enough for the court to retain jurisdiction.

However, this Court does find that both Tami Bollerman and Archie Patterson have individual standing. This Court further finds that each of them also has standing on the basis of suffering harm than is capable of repetition but evading review. This Court also finds that each of them has standing based on the public importance exception.

IT IS THEREFORE ORDERED that this case move forward as a class action based on my finding that the named plaintiffs meet the requirements to serve as class representatives.

AND IT IS SO ORDERED.

Honorable Doyet A. Early, III
Judge of the Second Circuit

April 12, 2017
Bamberg, South Carolina