

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM STATE OF SOUTH CAROLINA
Administrative Law Court

Honorable Deborah Brooks Durden
S.C. Administrative Law Court Judge

Appellate Case No: 2019-000898

Docket No. 19-ALJ-22-0004-AP

Eastwood Construction, LLC.....Appellant,

v.

South Carolina Department of Employment and Workforce
and Timothy Kern.....Respondents.

INITIAL BRIEF OF APPELLANT

RECEIVED

JUL 31 2019

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE AND THUS INELIGIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS WHEN HE ADMITTED TO UNLAWFULLY TRANSFERRING FUNDS BELONGING TO EASTWOOD TO A SEPARATE ACCOUNT CONTROLLED BY KERN AND SINNETT.

- II. WHETHER THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE BY BREACHING THE AGREEMENT BETWEEN FORTRESS AND EASTWOOD WHEN HE AND SINNETT MISREPRESENTED THE PROPER VALUE OF FORTRESS DURING THE SALE.

STATEMENT OF THE CASE

This matter is before the Court of Appeals pursuant to Eastwood Construction, LLC's ("Eastwood") appeal from the Administrative Law Court ("ALC"). The South Carolina Department of Employment and Workforce's ("Department") Appellate Panel ("Panel") affirmed the decision of the Appeals Tribunal ("Tribunal") finding that Timothy Kern ("Kern") was eligible to receive unemployment insurance benefits.

Kern worked for Eastwood from April 6, 2017, to December 11, 2017, as vice president of operations. Prior to Kern's employment with Eastwood, he and William Sinnett ("Sinnett") operated Fortress Builders, LLC ("Fortress"). Kern and Sinnett paid taxes on Fortress' earnings through their individual income taxes. They then entered into negotiations to sell Fortress's assets in April 2016. Prior to the sale, Fortress's assets and books were examined and a valuation for the company assets was determined by the parties, based upon which Eastwood purchased Fortress's assets and assumed certain specified liabilities all pursuant to an Asset and Goodwill Purchase Agreement ("Agreement"). Kern was hired by Eastwood as part of the Agreement.

Soon after the sale, Eastwood discovered that Fortress was worth over \$6 million less than the valuation showed due to accounting inconsistencies by Fortress. Eastwood advised Kern and Sinnett that they should file amended tax returns as they had over-reported Fortress's earnings on their individual tax returns for the previous three years. On August 28, 2018, Eastwood presented Kern and Sinnett with an agreement whereby they would turn over any tax refund money they may receive to Eastwood to compensate Eastwood for the pre and post-sale valuation discrepancy. Neither Kern nor Sinnett signed the document.

In September 2017, Kern filed an amended tax return to reclaim taxes on the business. On November 1, 2017, the Internal Revenue Service (“IRS”) deposited a refund of \$152,066.00 into Fortress’s operating account, which was under control of Eastwood as part of the sale. On November 7, 2017, Kern and Sinnett transferred the funds into a different account that was not affiliated with Fortress. On December 11, 2017, Eastwood terminated Kern for breaching the Agreement by misrepresenting the financial position of Fortress and taking the tax return money.

On April 9, 2018, Kern filed for unemployment insurance benefits alleging that Eastwood had terminated him without cause. Eastwood responded by stating that Kern’s discharge was due to failure to return the funds. On April 24, 2018, the claims adjudicator issued a determination that Kern was ineligible to receive benefits because he had been discharged for taking the funds.

On May 4, 2018, Kern submitted an appeal of the claims adjudicator’s determination to the Department’s Tribunal. On October 3, 2018, the Tribunal issued a decision reversing the claims adjudicator’s determination and finding Kern eligible for benefits on the basis that Kern’s separation occurred under non-disqualifying circumstances. On October 11, 2018, Eastwood appealed the determination to the Panel. On December 14, 2018, the Panel issued a decision affirming the Tribunal’s determination.

Eastwood then appealed to the ALC for judicial review of the Panel’s decision. By order on May 16, 2019, the ALC affirmed the Panel’s decision that Kern was eligible for benefits. Eastwood then appealed that decision to this Court.

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. *Olson v. S.C. Dep't of Health and Env'tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008). Section 1-23-610(C) of the South Carolina Code provides:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because of the finding, conclusion, or decision is:

- (a). in violation of constitutional or statutory provisions;
- (b). in excess of the statutory authority of the agency;
- (c). made upon lawful 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.

The decision of the ALC should be overturned if it is unsupported by substantial evidence or controlled by some error of law. *The Original Blue Ribbon Taxi Corp. v. South Carolina Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). The reviewing court may reverse or modify the ALC's decision if the finding, conclusion, or decision reached is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Blue Ribbon Taxi*, 380 S.C. at 605, 670 S.E.2d at 676. Substantial evidence, when considering the record as a whole, allows reasonable minds to reach the same conclusion as the ALC and is more than a scintilla of evidence. *Id.*

ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE AND THUS INELIGIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS WHEN HE ADMITTED TO UNLAWFULLY TRANSFERRING FUNDS BELONGING TO EASTWOOD TO A SEPARATE ACCOUNT CONTROLLED BY KERN AND SINNETT.

The ALC erred by affirming the decision of the lower Panel and Tribunal finding that Kern was eligible for unemployment insurance benefits. An unemployed insured worker is eligible to receive benefits only if he was separated from his most recent bona fide employer through no fault of his own. S.C. Code Ann. § 41-27-20 (1976). The record contains substantial evidence that Kern breached the Agreement by taking the money from Eastwood. Through direct examination by the hearing officer and through cross examination by Eastwood's counsel at the Tribunal hearing, it is clear that Kern was well aware of his misconduct and subsequently is not eligible for unemployment insurance benefits.

In the September 19, 2018 hearing before the Department Tribunal, Kern admitted that he was employed by Eastwood from April 6, 2017, to December 11, 2017. Transcript of Hearing 16:16-21, Sept. 19, 2018. He also testified that his employment was part of the Agreement pursuant to which Eastwood purchased Fortress's assets and assumed certain liabilities. Hr'g Tr. 19: 12-15. The Agreement further stated that Eastwood was entitled to "everything Fortress Builders had coming to it." Hr'g Tr. 85:27-28-86:1-2. During cross examination, Kern confirmed that Eastwood was entitled to any payments paid to Fortress after the Agreement closed. Hr'g Tr. 86:3. Thus, Kern testified that he was employed by

Eastwood as part of the Agreement between Eastwood and Fortress and that Eastwood was entitled to receive all of Fortress's assets, including those that were due in the future.

Kern and Sinnett received refunds from the IRS for overpayment of business taxes on Fortress, after Eastwood bought Fortress and found accounting inconsistencies in the tax returns. Kern testified that the money from this tax return was deposited into a Fortress business account which was owned by Eastwood. Hr'g Tr. 87:27. When asked if this was an account that was subject to the Agreement and sale with Eastwood, Kern replied "[Y]es." Hr'g Tr. 88:1-3. Kern also testified that he knew that Sinnett transferred the funds from the Fortress account into a separate account that was controlled only by him and Sinnett. Hr'g Tr. 26: 3-27-27:1-10. When asked why they moved the money, Kern stated that it was to "preserve that money." Hr'g Tr. 27:4. Kern and Sinnett have refused to return the money.

Kern, who had already established himself as an employee of Eastwood, admitted under oath that he transferred money from an account that he knew was subject to the Agreement into a separate account that only he and his partner, Sinnett, had access to or control over, to the exclusion of Eastwood. Kern and Sinnett intentionally moved these funds in an effort to preserve them for their own use and prevent Eastwood from obtaining the money owed to it under the Agreement. This action constitutes theft at its most basic level. Theft by an employee from the company for which he is employed is misconduct for which an employee can be terminated for cause. Kern admitted to all of this under oath.

In its Order, the ALC noted that Eastwood did not present any witnesses of its own and only sought to cross examine Kern. Order, Eastwood Construction, LLC v. S.C. Dept. of Employment and Workforce and Timothy Kern, 19-ALJ-22-0004-AP (S.C. Admin. Law

Court). However, the burden of proving one is eligible for benefits under the statutory framework is on the claimant, not the employer. S.C. Code Ann. § 41-35-110; *Hyman v. S.C. Employment Secur. Com.*, 234 S.C. 369, 108 S.E.2d 554 (1959). Thus, Eastwood is not required to produce any witnesses.

The ALC's decision that Kern was entitled to unemployment insurance benefits is wholly unsupported by substantial evidence within the record. Rather, there is substantial evidence in the record that Kern was terminated for cause and was ineligible for unemployment insurance benefits. Thus, the ALC's decision should be overturned as clearly erroneous.

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT KERN WAS TERMINATED FOR CAUSE BY BREACHING THE AGREEMENT BETWEEN FORTRESS AND EASTWOOD WHEN HE AND SINNETT MISREPRESENTED THE PROPER VALUE OF FORTRESS DURING THE SALE.

The ALC's decision to affirm the lower Panel and Tribunal's determination is clearly erroneous because there is substantial evidence in the record that Kern was terminated for cause by breaching the Agreement between Fortress and Eastwood. Kern admitted that there was an agreement between the two companies that Fortress would properly represent its value to Eastwood so that the sale may move forward. Kern also admitted that his representations regarding Fortress's value breached the Agreement.

As previously stated above, Kern admitted that he was an employee of Eastwood and that his employment was part of the Agreement between the two companies. Kern also testified that Fortress's books were incorrect in that they over valued the company by reporting more income than Fortress made. Hr'g Tr. 22:16-17. Later in the hearing, during cross examination, Kern was asked, "any breach of the purchase agreement would be a

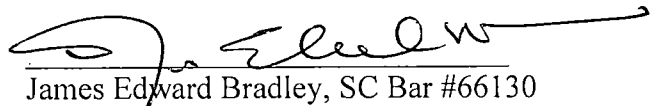
reason for your termination, whether you were employed any further”? Hr’g Tr. 75:6-8. He responded, “[T]rue.” Hr’g Tr. 75:9. He was then asked, “[A]ll right. And by providing inaccurate information, you breached the sales agreement.” Hr’g Tr. 75:10-11. Again, he responded, “[T]rue.” Hr’g Tr. 75:12. Counsel then asked, “[A]ll right. And that gave cause for Eastwood to terminate you”? Hr’g Tr. 75:13-14. He responded, “I-I-I suppose so.” Hr’g Tr. 75:18.

Kern testified under oath that he believed that by providing inaccurate information to Eastwood during the sale of his company, he was breaching the Agreement. He then further testified that he understood this breach to be cause for his termination from Eastwood. It is clear from the record in this case that there was substantial evidence that Kern was terminated for cause when he breached the Agreement with Eastwood. Accordingly, the ALC’s decision is clearly erroneous as it is unsupported by substantial evidence in the record. Thus, the Court should overturn the decision as clearly erroneous.

CONCLUSION

For the reasons set forth above, the ALC’s decision is unsupported by substantial evidence in the record and should be overturned as clearly erroneous.

Respectfully submitted,



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July 30, 2019

THE STATE OF SOUTH CAROLINA
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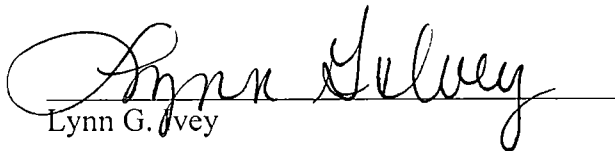
South Carolina Department of Employment and Workforce
and Timothy Kern,..... Respondents.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have served the Initial Brief of Appellant and Designation of Matter on Respondents by depositing a copy of same in the United States Mail, postage prepaid, on July 31, 2019, addressed as follows:

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Appellate Case No. 2019-000898

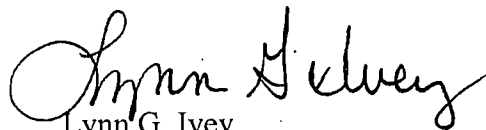
Dear Ms. Kitchings:

Enclosed for filing with your office are the original and four copies of Appellant Eastwood Construction, LLC's Initial Brief, Designation of Matter and Proof of Service in this matter. Please have the extra copies clocked in and returned to us via our courier.

By copy of this letter, I am serving Respondents' counsel with the Initial Brief and Designation of Matter.

Thank you for your assistance with this filing.

Sincerely,



Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: Jacqueline Pavlicek, Esquire (via first class mail)
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