

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Appeal from
South Carolina Administrative Law Court APR 3 2013

John D. McLeod, Administrative Law Judge S.C. Supreme Court

Unpublished Opinion No. 2013-UP-056
Heard December 12, 2012 - Filed January 30, 2013

William Lippincott,

Petitioner,

v.

South Carolina Department of Employment and Workforce
And Wal-Mart Associates, Inc.,

Respondents.

APPENDIX

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0343-AP

William E. Lippincott,

Appellant

v.

South Carolina Department of
Employment and Workforce and
Wal-Mart Associates, Inc.,

Respondents.

RECORD ON APPEAL

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ORDER OF OCTOBER 18, 2011

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

William Lippincott,

Appellant,

vs.

South Carolina Department of
Employment and Workforce and Wal-Mart
Associates,

Respondents.

Docket No. 11-ALJ-22-0343-AP

ORDER

STATEMENT OF CASE

This matter is an appeal by Appellant William Lippincott (Appellant) from a decision of the South Carolina Department of Employment and Workforce (Department) disqualifying the Appellant from receiving unemployment benefits for a period of 14 weeks pursuant to S.C. Code Ann. § 41-35-120(2) (Supp. 2010). Appellant argues on appeal that the Department erred by finding that Respondent Wal-Mart terminated him from his employment for cause. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2010). Upon consideration of the briefs and record, I affirm.¹

BACKGROUND

The Appellant worked at a Florence, South Carolina Wal-Mart store from May 11, 1992 until January 31, 2011, with the most recent job title of "Sales Associate." Wal-Mart terminated the Appellant after store management became aware of the Appellant's criminal arrest for accessory to a theft and subsequent enrollment in a pre-trial intervention (PTI) program. The Appellant applied for unemployment benefits on or around January 30, 2011, and a Department claims adjudicator found him disqualified for a period of 14 weeks. The Appellant sought a hearing before the Appeal Tribunal, which affirmed the decision of the claims adjudicator after holding an evidentiary hearing. The Appellate Panel also affirmed, finding that Wal-Mart terminated the Appellant for cause.

¹ This case was decided without oral argument pursuant to ALC Rule 39.

FILED

OCT 18 2011

SC ADMIN. LAW COURT

The Record contains very little about the incident leading to the Appellant's termination from his employment, although the transcript of the hearing before the Appeal Tribunal contains testimony of the Appellant recounting what happened. The Appellant took a vacation from work starting July 12, 2010. That same day, he was arrested in Lynchburg, South Carolina, for helping two other people attempt to steal copper. He returned to work after his time off, and continued working until he informed Wal-Mart in January of 2011 that he had entered a PTI program. It appears that the Appellant had a court date in September of 2010 and entered the PTI program at some point in early January, at which time he informed Wal-Mart about the incident. Wal-Mart suspended him at that point, for a period of three weeks leading up to his termination on January 31, 2011.

The Record contains a company policy addressing employee arrests and convictions. The policy states:

If you are arrested and charged with a felony or misdemeanor, we will conduct a review to determine whether the charges are job-related (i.e. examine the relationship of the charges to your position) and whether the alleged conduct that caused you to be arrested indicates that you are unfit for your job. If we determine the charges are not job-related, you will be allowed to continue working.

The policy goes on to describe procedures for suspending and terminating an employee charged or convicted with crimes that related to his job. Also found in the record is the Appellant's exit interview, documented on a Wal-Mart form, which states, "Associate violated associate arrest and convictions policy."

The Appellant and his father testified before the Appeal Tribunal. The Appellant admitted to his arrest, and he and his father testified regarding the Appellant's final meeting with his supervisors. No Wal-Mart representative appeared at the evidentiary hearing.

ISSUES ON APPEAL

1. Did the Department err in finding that the Wal-Mart terminated the Appellant for cause?

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, the 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. 2010); 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). Section 1-23-380(5) of the South Carolina Code (Supp. 2010) provides the standard used by appellate bodies to review agency decisions. See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section states:

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.

§ 1-23-380(5).

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. Dep't 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)). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996).

Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 467 S.E.2d at 917.

DISCUSSION

The Appellant argues that the Department erred in finding that Wal-Mart terminated him for cause, because the employer failed to follow its own policy in terminating the Appellant, because there was no evidence that Wal-Mart found the Appellant's criminal arrest related to his job, and because the Department failed to determine whether the employer's policy was reasonable. The Court disagrees.

When the Department determines that an employer has discharged an employee for cause in connection with the worker's most recent employment, it must reduce the period in which the worker is qualified for unemployment benefits. S.C. Code Ann. § 41-35-120(2) (Supp. 2010). A discharge for cause is justified when, among other things, an employee disregards the standard of behavior that an employer can rightfully expect from the employee, such as when the employee refuses to comply with a reasonable request of the employer. Mickens v. Southland Exch.-Joint Venture, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991), citing Lee v. S.C. Employment Security Comm'n, 277 S.C. 586, 291 S.E.2d 378 (1982). South Carolina courts have equated "for cause" in the current version of the statute with the term misconduct in the predecessor statute. Id. A finding of misconduct does not mandate some willful or deliberate act on the part of the employee. Lee, 277 S.C. at 588, 291 S.E.2d at 379. Upon finding that an employee has been discharged for cause, the Department determines the length of the employee's disqualification period based on the seriousness of the cause for discharge. § 41-35-120(2). The disqualification period can extend from a minimum of five weeks to a maximum of twenty-six weeks. Id.; S.C. Jur. Labor Relations § 24 (Westlaw through August 2010).

As to the Appellant's argument that Wal-Mart failed to follow its own policy, the Court finds that the record contains enough evidence to support a finding that Wal-Mart did apply its policy correctly, and that even if Wal-Mart misapplied its policy, this Court would still affirm the Department decision. As to the evidentiary support for Wal-Mart's application of its arrest and convictions policy, the Appellant's exit interview states that "Associate violated associate arrest

and convictions policy.” Inherent in Wal-Mart’s statement is the conclusion that Wal-Mart in fact applied its policy. That is, by saying that the Appellant violated the policy, Wal-Mart is necessarily saying it applied the policy to the facts in question, and concluded that the Appellant’s behavior ran afoul of the policy, to include the policy’s requirement that the arrest be related to his job. To the extent that the Appellant’s and his father’s testimony during the hearing suggested that a supervisor told the Appellant his termination was mere result of his participation in PTI, the Court would point out that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Wal-Mart’s written statement in the exit interview alone is enough to support the conclusion that Wal-Mart fully applied its policy. A reasonable mind could have reached the same conclusion as the agency in finding that the Appellant did violate Wal-Mart’s arrest and convictions policy.

Even if Wal-Mart did not apply its policy correctly would not necessarily require this Court to reverse the Department decision, because whether the employer properly applied the policy is not conclusive as to whether the employee failed to meet the standard of behavior the employer can expect. Both could be simultaneously true; that is, Wal-Mart could have misapplied its policy, and the Appellant could have disregarded the standard of behavior that Wal-Mart can rightfully expect from its employees under the law. If the latter is true, the employee is not eligible for benefits, even if the former is also true. See, Stagg v. Vintage Place Inc., 796 N.W.2d 312, 316 (Minn. 2011) (“whether an employer follows the procedures in its employee manual says nothing about whether the employee has violated the employer’s standards of behavior. Put another way, an employee’s expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee’s conduct violated the standards the employer has a reasonable right to expect....”).

Under the forgoing analysis, the relevant question becomes whether, regardless of the application of the policy, the Appellant’s arrest violated the standard of behavior Wal-Mart can rightfully expect from its employees. Wal-Mart’s requirement that an arrest or conviction be related to work certainly overlaps with South Carolina’s statutory requirement that a disqualifying cause for termination be “connected with the employment.” S.C. Code Ann. § 41-35-120(2). Regardless, Wal-Mart’s rightful expectations of its employees’ behavior for purposes

of unemployment benefits only cover circumstances and behavior “connected with the employment” within that phrase’s meaning under South Carolina law.

No South Carolina case gives comprehensive guidance on what behaviors are connected with employment in the context of unemployment benefits. However, one opinion of the South Carolina Court of Appeals does address the issue. See, Milliken & Co., Pendleton Plant v. South Carolina Employment Sec. Comm’n, 315 S.C. 492, 445 S.E.2d 640 (Ct. App. 1994), rev’d on other grounds, 321 S.C. 349, 468 S.E.2d 638 (1996), reh’g denied, (Apr. 18, 1996). The Court looks to Milliken with at least some reservation because of its reversal in the Supreme Court, though it appears that the Supreme Court only reversed the decision on the basis of the substantial evidence standard of review, without addressing the reasoning of the Court of Appeals opinion. Suffice it to say that this Court recognizes that Milliken is not conclusive as to how South Carolina would ultimately construe “connected with the employment” in § 41-35-120(2).

In Milliken, the Court of Appeals reviewed an Employment Security Commission decision regarding the termination of a Milliken employee who engaged in disruptive behavior that may have taken place in the break room at work. In analyzing whether this behavior was connected to the employment, the Court of Appeals cited four factors to consider in considering the connection of misconduct to employment, none of which appears to be present in this case. Namely, it said, “Factors to consider include whether the act occurred during working hours; whether the act occurred while the employee was engaged in her work; whether the act occurred on the employer’s premises; and whether the employee took advantage of the employment relation in order to commit the act.” Milliken at 497, 445 S.E.2d at 644. The Court of Appeals points out that no element of this test is dispositive and the list is not exhaustive. The opinion also cites cases that speaking to the possibility that wholly off-duty acts can constitute cause connected with the employment; specifically, O’Neal v. Employment Sec. Agency, 89 Idaho 313, 404 P.2d 600 (1965) (recognizing that there are circumstances in which conduct is so closely connected with the business interests of the employer that it may warrant disqualification of benefits even if it occurs off of the working premises) and Johnson v. Board of Comm’rs, 348 So.2d 1289 (La.App.1977) (noting that disqualification for misconduct is dependent upon the peculiar facts of each case and such conduct does not have to occur on the job). The test cited in

Milliken seems to originate from a 1945 Yale Law Review article: Katherine Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 Yale L.J. 147, 166 (1945).

Even though it appears that South Carolina Court of Appeals would adopt the test “Kempfer” test described above, its opinion leaves open the possibility that off-premises work can constitute misconduct. 76 Am. Jur. 2d Unemployment Compensation § 78, also cited in Milliken, consists of the following language, which could be seen as augmenting the “Kempfer” test and effectively broadening it regarding misconduct that takes place wholly off the work-premises:

A rule laid down by the employer governing off-duty conduct of employees must have a reasonable relationship to the employer's interests in order for violation thereof to constitute misconduct barring eligibility for unemployment compensation benefits. The question of the reasonableness of such a rule is to be tested by the rule's relationship to the business interests of the employer at the time of the making of the rule, rather than at the time of the employee's violation thereof. A rule of this type may be regarded as reasonable where a violation is reasonably likely to harm the employer's business interests, even though the actual violation does not result in actual harm to the business interests of the employer.

76 Am. Jur. 2d Unemployment Compensation § 78. (internal citations omitted).

This Court sees the relevant inquiry, therefore, as probing the extent to which off-duty misconduct threatens the employer's interest. To what extent did the Appellant's arrest for acting as an accessory to theft threaten Wal-Mart's business interest? The Appellate Panel wrote, in reference to Wal-Mart's policy:

The connection to the work is that the nature of the crime is such that it could possibly jeopardize the employer's business if an individual had participated in a crime where like behavior could manifest itself in the workplace. The employer's policy gives theft as an example. Such a proposition is the nexus between the arrest and the workplace.

This Court agrees with the Appellate Panel that the Appellant's admitted behavior of helping others attempt to steal threatens Wal-Mart's business interest. Wal-Mart has an interest in employing Sales Associates who refrain from helping others attempt to steal. The obvious nature of Wal-Mart as a retail store containing untold quantities of portable goods, coupled with the Appellant's exhibited willingness to engage in criminal behavior designed to wrongfully take and carry away of the goods of another against the owner's will or without his consent, shows

that Wal-Mart discharged the Appellant for misconduct connected with his employment as a Sales Associate.

The Appellant notes in his brief that he testified during the evidentiary hearing that he did not receive the arrest and convictions policy. The Court does not view this as fatal to the Department's decision. If an employer needed to outline every single circumstance that could possibly violate the standard of behavior rightfully expected, claims of termination without cause even in cases of egregious employee conduct would render the unemployment benefit process susceptible to abuse and contravene the purpose of South Carolina's unemployment law. See, S.C. Code Ann. § 41-27-20 (the "Declaration of State public policy," stating that unemployment benefits should "be used for the benefit of persons unemployed through no fault of their own."). Authority from other jurisdictions supports the conclusion that the failure to provide a written rule governing employee conduct does not necessarily result in a finding that the employee did not violate the standard of behavior an employer can rightfully expect. "An employer is not required to prove the existence of a reasonable rule or policy by direct evidence, but the court may reach that determination by a common-sense realization that certain conduct intentionally and substantially disregards an employer's interests." 76 Am. Jur. 2d Unemployment Compensation § 72. "The mere fact of a lack of communication of behavioral standards to Oxley does not automatically make Mazons [sic] expectations unreasonable." Oxley v. Med. Rock Specialties, Inc., 80 P.3d 1077, 1081 (2003). The common sense determination in this case is that a retailer does not want people in its employ who have a history of helping others attempt to steal.

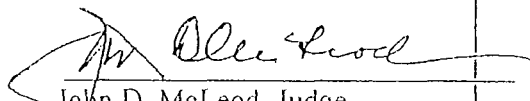
The Appellant argues that this Court should reverse the Department decision because it failed to make an explicit finding that the Wal-Mart arrest and convictions policy was reasonable. However, the record refutes this statement. The Appellate Panel explicitly found Wal-Mart's policy reasonable. The Appellate Panel may make findings of fact and conclusions of law pursuant to S.C. Code Ann. § 41-35-710. See also, Merck v. S. Carolina Employment Sec. Comm'n, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986), ("the Commission reviews the decision of the appeal tribunal "on the basis of the evidence previously submitted in such case or [it may] direct the taking of additional evidence." The Commission has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal.').

Finally, the Appellant urges this Court to adopt the rule that the Department should engage in a burden shifting analysis and require an employer to prove that it discharged an employee for cause. The Court declines the invitation. The Supreme Court of South Carolina has clearly stated that a claimant has the burden of proof. "Where a claimant files an application for unemployment compensation benefits, the burden is upon such claimant to show that he has met the benefit eligibility conditions." Hyman v. S. Carolina Employment Sec. Comm'n, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). While the Court acknowledges the potential of the Appellant's argument and recognizes that there is ample authority from other jurisdictions supporting a shift in the burden of proof once a claimant has made an initial showing of eligibility, the Court views Hyman as too explicit on the point to allow for tinkering in the ALC. Any expounding or development on the dictate of Hyman should occur in this state's courts of precedence, and this Court would be improvident to potentially traverse Hyman's clear requirement that the Appellant shoulder the burden of proof in his pursuit of unemployment benefits.

Accordingly, because substantial evidence supports the conclusion that Wal-Mart terminated the Appellant for cause, the Department's decision must be affirmed. See §§ 1-23-380, -600(D); McEachern, 370 S.C. at 561, 635 S.E.2d at 649.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.
AND IT IS SO ORDERED.


John D. McLeod, Judge
S.C. Administrative Law Court

October 18, 2011
Columbia, South Carolina

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

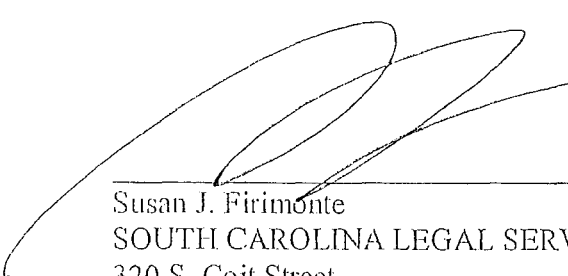
This 18 day of October, 2011
By: Anthony R. Goldman
Judicial Law Clerk

SUMMONS AND PETITION FOR JUDICIAL REVIEW

STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE LAW
	)	COURT
COUNTY OF RICHLAND	)	
 William E. Lippincott,	)	 CASE NO.:
	)	
Petitioner,	)	
	)	
v.	)	SUMMONS
	)	
Wal-Mart Associates, Inc. and	)	
South Carolina Department of Employment	)	
And Workforce,	)	
	)	
Respondents.	)	
_____	)	

TO THE RESPONDENTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition for Judicial Review in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Petition on the subscriber at 320 S. Coit Street, Florence, South Carolina 29501, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Petition within that time, the Petitioner shall apply to the Court for a judgment by default against you for the relief demanded in this Petition.



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Florence, South Carolina
June 24, 2011

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE LAW
	)	COURT
COUNTY OF RICHLAND	)	
William E. Lippincott,	)	CASE NO.:
	)	
Petitioner,	)	
	)	
v.	)	PETITION FOR JUDICIAL REVIEW
	)	OF THE FINAL DECISION OF THE
Wal-Mart Associates, Inc. and	)	SOUTH CAROLINA DEPARTMENT
South Carolina Department of Employment	)	OF EMPLOYMENT AND WORKFORCE
And Workforce,	)	
	)	
Respondents.	)	
	)	

Now comes the Petitioner, complaining of the Respondents herein, and respectfully shows this Court that:

1. This action for judicial review of the Final Decision of the South Carolina Department of Employment and Workforce is brought pursuant to S.C. Code Ann. §§ 1-23-380 and 41-35-750.
2. Petitioner is a resident of Florence County, South Carolina.
3. Respondent South Carolina Department of Employment and Workforce (hereinafter "Respondent Department") is an administrative agency of the State of South Carolina as defined in S.C. Code Ann. § 1-23-310(1) and is authorized by § 41-35-710 to hear and decide appeals of awards or denials of unemployment benefits.
4. Petitioner was separated from his job with Wal-Mart Associates, Inc. (hereinafter referred to as "Employer") on January 31, 2011.
5. Petitioner applied with Respondent Department for unemployment benefits and by Initial Determination was found disqualified for benefits.
6. Petitioner appealed the Initial Determination to the Respondent's Appeal Tribunal and an evidentiary hearing was conducted on April 12, 2011. After receiving evidence and testimony

from the Petitioner, the Appeal Tribunal issued its decision (Decision No. 2011-A-6242) affirming the previous holding and finding Petitioner discharged for cause. Petitioner was disqualified from receiving benefits for fourteen weeks effective January 30, 2011 through May 7, 2011, along with a corresponding reduction in the claimant's maximum potential benefit amount.

7. Petitioner appealed the Appeal Tribunal decision to the Appellate Panel (Appeal No. 04848-14595). The Appellate Panel affirmed the Appeal Tribunal with its decision dated June 17, 2011.

8. Petitioner has exhausted all administrative remedies available to him within Respondent Department's appeals process.

9. Petitioner asserts that Respondent Department committed serious errors in holding him discharged for cause:

(a) The Petitioner was wrongly denied unemployment compensation benefits where the Petitioner did not violate Employer's policy.

(b) The Respondent Department improperly shifted the burden of proof in this matter and failed to require the Employer to prove any alleged misconduct which would result in a disqualification for benefits under the statute.

(c) The Respondent Department failed to make a determination of reasonableness with regard to Employer's policy.

(d) The Respondent Department's interpretation of the Employer's policy is unreasonable and should not be used to deprive Petitioner of unemployment compensation benefits.

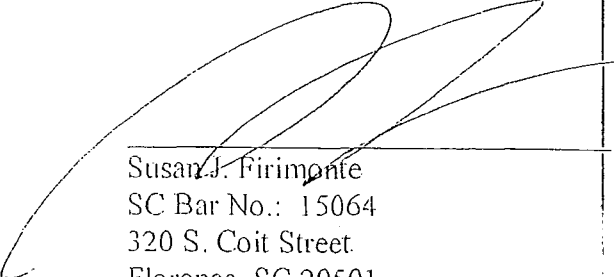
(e) The Respondent Department committed error of law by finding that Petitioner's participation in a pre-trial intervention program was sufficient, in and of itself, for discharge for cause.

(f) The reliable record does not support a finding that the Petitioner was discharged for cause.

WHEREFORE, Petitioner prays that this Court, pursuant to S.C. Code Ann. §§ 1-23-380 and 41-35-750, reverse the Respondent Department's decision and find Petitioner entitled to unemployment compensation benefits.

Respectfully Submitted,

SOUTH CAROLINA LEGAL SERVICES



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ATTORNEYS FOR PETITIONER

Florence, South Carolina
June 24, 2011

APPELLATE PANEL DECISION

Decision No. 2011-P-1346

Appeal No. 04847-14595

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
Columbia, South Carolina

IN THE MATTER OF THE CLAIM OF:

William E. Lippincott

1222 Springbranch Road)

Florence, SC 29501)

Claimant SSN: [REDACTED])

APPELLATE PANEL
DECISION

Wal-Mart Associates, Inc.)

c/o TALX Express)

Columbus, OH 43218)

Liable Employer)

Appellant: Claimant

The Claimant appealed Appeal Tribunal Decision 2011-A-6242 to the Appellate Panel. The Tribunal disqualified the claimant from benefits upon finding he was discharged for cause. This decision affirmed the claims adjudicator's determination.

The Appellate Panel notified the parties of its hearing to consider the appeal.

DECISION

Appeal Tribunal Decision 2011-A-6242 is affirmed. The claimant is disqualified from benefits for fourteen (14) weeks, from January 30, 2011, to May 7, 2011, with a corresponding monetary reduction, upon finding he was discharged for cause connected with the employment.

The claimant worked from May 11, 1992, to January 31, 2011, most recently as a sales associate. The claimant was discharged for violating employer policy relative to his being arrested for a theft crime and subsequently being admitted to a pretrial intervention program. While on vacation in July of 2010, the claimant was arrested for accessory before the fact of theft. He posted bond during his vacation and returned to work as expected. In January of 2011, the claimant was accepted into a pretrial intervention program. Upon his informing the employer of the circumstances, he was suspended and subsequently discharged in accordance with employer policy. The employer entered the

policy into evidence, and it outlines the procedure for making the determination to discharge an associate under these circumstances.

The claimant asserted that his discharge was too severe a punishment, and that his circumstances did not warrant a discharge. The claimant maintained that the employer did not follow its own policy, and that the determination to discharge him was based solely on the fact that he was admitted to a pretrial intervention program.

S.C. Code Ann. § 41-35-120 (2) requires disqualification from benefits for five to twenty-six weeks, with a corresponding monetary reduction, when the Department finds that a claimant has been discharged for cause connected with the employment. "Cause" is interpreted as disregard for the standard of behavior an employer has the right to expect from an employee.

The record establishes that the claimant was arrested for a crime that involved theft. As soon as the employer was made aware of the charge, the claimant was suspended. The employer made the determination to discharge the claimant after he was admitted to a pretrial intervention program, which is in accordance with its policy.

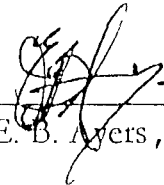
Counsel for the claimant argues that the arrest was non-job related because it did not occur on the job or in the performance of the claimant's duties. That same premise was the basis for Counsel's argument that the misconduct was not connected to the work. Lastly, counsel maintains the administrative hearing officer did not make a determination that the employer's policy was reasonable.

A careful reading of the employer's policy shows that the arrest does not have to occur on the job or in the performance of an associate's duties. The connection to the work is that the nature of the crime is such that it could possibly jeopardize the employer's business if an individual had participated in a crime where like behavior could manifest itself in the workplace. The employer's policy gives theft as an example. Such a proposition is the nexus between the arrest and the workplace. A specific finding of reasonableness on the part of the hearing officer is not required, and the Tribunal's silence on the issue indicates that the hearing officer found the policy to be reasonable. However, to specifically address this issue, this Appellate Panel finds the policy reasonable.

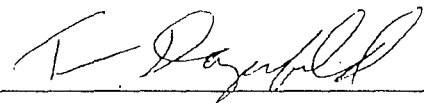
The claimant's actions demonstrated a disregard for the standard of behavior the employer had the right to expect of him. Therefore, we find the claimant was discharged for cause connected with the employment. The Appeal Tribunal decision is affirmed.

Ayers dissents.

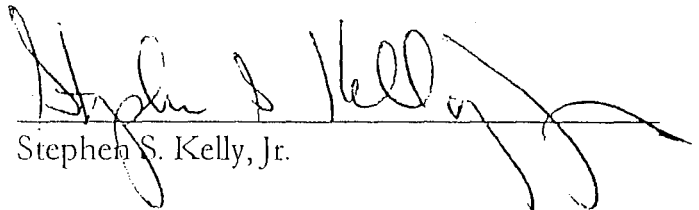
**SOUTH CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE**



E. B. Ayers, **dissents**



Tim Dangerfield



Stephen S. Kelly, Jr.

Hearing Date: 06/14/11
Date Mailed: 06/17/11
Mailed By: _____

June 17, 2011

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
(SCDEW)
Columbia, South Carolina

NOTICE OF MAILING OF APPELLATE PANEL DECISION

Attached is a copy of the final agency decision of SCDEW in this case. Any further appeal is to the South Carolina Administrative Law Court. To obtain judicial review of this decision, you must comply with the requirements of S.C. Code Ann. §41-35-750 and the Rules of Procedure of the Administrative Law Court. The Court may require a filing fee.

The law requires that a Petition for Judicial Review must be filed with the Court and served on all parties and SCDEW within thirty (30) days from the date of mailing of the agency's final decision (see the mailing date above).

Service of the Petition on SCDEW must be addressed and mailed to:

Legal Department
S.C. Department of Employment and Workforce
Post Office Box 995
Columbia, SC 29202

SCDEW cannot advise a party on any legal matter. For legal advice or assistance in filing an appeal to the Administrative Law Court, you should consult an attorney licensed to practice in South Carolina.

Form App-115
Rev. 4/27/11

Form App-111 NET Rev 5/10
Catalog#: 08170

Appeal No. _____

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE
P. O. BOX 995, COLUMBIA, SC 29202**APPLICATION FOR LEAVE TO APPEAL TO THE APPELLATE PANEL**Claimant's Name William E. LippincottSSN [REDACTED]Address 1222 Springbranch Road, Florence, SC 29501

Date of

Initial Claim 1-30-11Employer's Name Wal-MartAddress 230 N. Beltline Drive, Florence, SC 29501Party Appealing CLAIMANTOn 4-15-11, I received Appeal Tribunal Decision Number 2011-A-6242

(Date of Receipt)

mailed to me on 4-13-11 and ask for review of the record on the following grounds:

(Mailing Date on Decision)

1. The hearing officer erred in stating that Wal-Mart's policy provides for termination in Claimant's case where the policy actually does not because Claimant's conduct was not related to work. The policy is clear in not discharging employees where the alleged criminal conduct is not work related.
2. The hearing officer erred in failing to determine whether Wal-Mart's policy (even if it did apply to Claimant's situation) was reasonable. This was error where the policy was applied to Claimant.
3. The hearing officer erred as a matter of law in failing to award unemployment benefits where there was no misconduct connected to work which is required under §41-35-120 of the SC Code.

* If appeal is untimely, state the reason. If appellant failed to attend Appeal Tribunal hearing, state the reason and whether postponement was requested:

I know that I must continue to file my claims for each week of unemployment during the pendency of this appeal, I know that I can only be paid for those weeks that I have timely claimed. If I have received benefits and am ruled disqualified or ineligible, I know that I will be required to repay the benefits I have received for that time period.

SC Employment Comm. **SCDEW**
APR 25 2011
Received Benefits Div. Lower Authority Appeals

**As a Board of Review, the Appellate Panel is confined solely to the record submitted by the Appeal Tribunal and does not accept additional evidence or testimony in its consideration of the appeal.

Appellant William E. Lippincott

Signed by Susan J. Firimonte, SC Legal Services

Title Attorney

Date 4-21-11

Does claimant need an interpreter? ☐ YES ☐ NO

What language/dialect? English

Claimant is ☐ Deaf ☐ Mute

SCDEW

APR 22 2011

Lower Authority Appeals

SC Employment Comm.

APR 25 2011

Received Benefits Div.

NOTICE OF CLAIMANT APPEAL TO APPELLATE PANEL

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
631 Hampton Street
P.O. Box 995
Columbia, SC 29202

NOTICE OF CLAIMANT APPEAL TO THE APPELLATE PANEL

DATE: April 29, 2011

APPEAL NO: 04847-14595

CLAIMANT:

William Lippincott
1222 Springbranch Road
Florence, SC 29501
SSN: [REDACTED]

LIABLE EMPLOYER:

Wal-Mart Associates, Inc.
c/o TALX UC Express
P. O. Box 182366
Columbus, OH 43218

SEPARATING EMPLOYER:

The claimant in this case appealed the Appeal Tribunal Decision to the Appellate Panel for review. A copy of the appeal is attached.

The Panel will review your case as soon as possible. If a hearing is scheduled, a copy of the transcript and the hearing notice will be mailed to you at a later date.

Any benefits received by the claimant might be subject to recovery if the Appeal Tribunal Decision is reversed. The claimants must continue filing a weekly claim pending the appeal in order to receive benefits.

Legal Department
Telephone: (803) 737-1105

cc: Claimant:
Liable Employer:
Separating Employer:
Local Office: Florence
Claimant's Attorney: Susan Firimonte, Esquire
Employer's Attorney:
Imaging
File

DECISION OF APPEAL TRIBUNAL

Appeal No: 1104847

Case No: 2011-A-6242

SOUTH CAROLINA
DEPARTMENT OF EMPLOYMENT AND WORKFORCE

DECISION OF APPEAL TRIBUNAL

Hearing Date: April 12, 2011

WILLIAM E. LIPPINCOTT
1222 SPRINGBRANCH RD
FLORENCE, SC 29501

)
)
)
)

CLAIMANT

WAL-MART ASSOCIATES INC
C/O TALX UC EXPRESS
PO BOX 182366
COLUMBUS, OH 43218

)
)
)
)
)

EMPLOYER

APPELLANT: Claimant

SS NO:

APPEARANCES

FOR THE Present with One
CLAIMANT: Witness and Attorney

FOR THE One Witness
EMPLOYER: (No Testimony Given)

FINDINGS OF FACT

The issue in this case is whether the claimant was discharged for "cause."

The claimant appealed the determination mailed March 4, 2011, which held the claimant disqualified from receiving benefits for fourteen (14) weeks, effective January 30, 2011, through May 7, 2011, along with a corresponding reduction in the maximum potential benefit amount, upon a finding the claimant was discharged for cause.

The claimant worked from May 11, 1992, to January 31, 2011, with the subject employer, most recently as a sales associate. The claimant was discharged for violation of company policy. The claimant had been arrested in July 2010 while on vacation for accessory to theft. He did not notify the employer of the arrest because he had not missed any time from work. The court allowed the claimant to apply for a pretrial intervention program. In January 2011 the claimant notified the employer of his participation in the program and was suspended from work. On January 31, 2011 the claimant was informed that he was discharged for violation of the employer's policy which states termination of employment for employees who are allowed by the court to enter into such programs.

REASONS

South Carolina Code provides in §41-35-120(2) for a disqualification of from five (5) to twenty-six (26) weeks, with a corresponding monetary reduction, if the Agency finds the claimant was discharged for "cause" connected with the most recent bona fide employment.

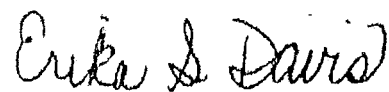
"Cause" includes, but is not limited to, a violation of the employer's reasonable rules or regulations, or a disregard for the standards of behavior that an employer has a right to expect of an employee.

In this case, the employer witness left the hearing without providing testimony. The claimant was discharged for violation of employer's policy following his entry into a deferred prosecution program. The claimant acted in a manner, which he knew or reasonably should have known, would jeopardize his employment. The claimant was discharged for cause and the law requires a disqualification.

DECISION

The Tribunal hereby holds the claimant disqualified from receiving benefits for fourteen (14) weeks, effective January 30, 2011, through May 7, 2011, along with a corresponding reduction in the maximum potential benefit amount, upon a finding the claimant was discharged for cause. This decision affirms the determination mailed March 4, 2011.

This will be the final decision of the Agency, unless you file an appeal to the Appellate Panel setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date of this decision. If the tenth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Workforce Center, or by mail, addressed to "Appellate Panel," Post Office Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Workforce Center.



Erika S. Davis
Administrative Hearing Officer

ESD: alw

Decision Mailed: 04/13/11

Mailed on the above Date By: 

NOTICE OF HEARING BEFORE APPEAL TRIBUNAL

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
P.O. Box 995, Columbia, South Carolina 29202

APP-105
Revised 7/02

NOTICE OF HEARING BEFORE APPEAL TRIBUNAL

Claimant's Name: WILLIAM E LIPPINCOTT Social Security Number: [REDACTED]
Address: 1222 SPRINGBRANCH RD
FLORENCE SC 29501-8536

Employer's Name: WAL-MART ASSOCIA

Appeal Number: 1104847 Hearing Date: 04/12/11 Hearing Time: 11:45 AM
Month/Day/Year Hour/Minute

Hearing Location: SC DEPARTMENT OF EMPLOYMENT & WORKFORCE
1558 WEST EVANS STREET FLORENCE SC 29501

Before: ERIKA S. DAVIS

IMPORTANT: IF YOU HAVE APPEALED AND FAIL TO APPEAR WITHIN TEN (10) MINUTES AFTER THE SCHEDULED TIME FOR THE HEARING TO BEGIN, YOUR APPEAL MAY BE DISMISSED. FAILURE OF EITHER PARTY TO PARTICIPATE MAY RESULT IN YOUR INTERESTS BEING ABANDONED.

THE HEARING WILL NOT BE POSTPONED EXCEPT FOR AN EMERGENCY. Contact a representative of the Commission at (803) 737-2520, AT ONCE, if you cannot be present at the time scheduled and wish to request a postponement of the hearing. Also, if you require any special needs, such as an interpreter, please contact us prior to the hearing.

ISSUES

☒ Voluntary Quit (for good cause)	☐ Voluntary Retirement	☐ Timeliness of Appeal
☒ Discharge (for disqualifying cause)	☐ Absence from Hearing	☐ Fraud & Overpayment
☐ Availability	☐ Overpayment	☐ Job Offer & Referral
☐ Eligibility	☐ Other	

EVIDENCE: This hearing is your only chance to testify and present evidence. Sworn testimony is required from witnesses with first-hand knowledge. Only documents, such as business records (for example: timesheets, employer's policies or handbook, warnings) can be considered and must be submitted with an original and two copies. The original will be returned. No testimony or evidence will be considered from witnesses who are not present.

SUBPOENAS: If a witness is reluctant to appear, you may apply for a subpoena through the Commission's local office or the Appeal Tribunal at (803) 737-2520.

LEGAL REPRESENTATION: An attorney licensed to practice in South Carolina may represent you. It is your responsibility to obtain representation prior to the hearing. Fees charged to represent claimants are limited by the Commission.

BENEFITS: A claimant should continue to file for benefits during the appeal process. Weeks not claimed cannot be paid, even if the claimant is held eligible.

THIS NOTICE SUPERSEDES ANY PREVIOUS HEARING NOTICE YOU MAY HAVE RECEIVED. IF THE DATE ON THIS NOTICE IS LATER THAN THE DATE ON ANY OTHER NOTICE, YOU SHOULD ASSUME THAT THE PREVIOUS HEARING HAS BEEN POSTPONED AND FOLLOW THE INSTRUCTIONS ON THIS NOTICE.

MAILING DATE: 03/30/2011

SMALL CHILDREN AND PETS ARE NOT ALLOWED IN HEARINGS

GENERAL INFORMATION ON THE S.C. EMPLOYMENT SECURITY LAW IS ON THE BACK OF THIS NOTICE.

1-29-12

NOTICE OF APPEAL TO APPEAL TRIBUNAL



**South Carolina
Legal Services**

Extending the Scales of Justice

320 S. Coit Street, Florence, South Carolina 29501
Phone: (843) 413-9500 Fax: (843) 413-1013
www.sclsc.org / www.lawhelp.org/sc / www.probono.net/sc

Sent
3/14
HHS

VIA FACSIMILE (803-737-0287)
AND FIRST CLASS MAIL

March 10, 2011

Attn: Appeals
S. C. Department of Employment and Workforce
Post Office Box 995
1550 Gadsden Street
Columbia, South Carolina 29202

SCDEW

MAR 09 2011

Lower Authority Appeals

Re: William E. Lippincott/ SSN: [REDACTED]
Date of Notice: March 3, 2011

APPEAL OF NOTICE OF DETERMINATION DATED MARCH 3, 2011
NOTICE OF APPEARANCE OF COUNSEL

Dear Sir/Madam:

Please be advised that on behalf of William E. Lippincott, we are respectfully submitting this appeal of the denial of unemployment compensation benefits and the imposition of a fourteen week penalty.

Mr. Lippincott denies that he was discharged for cause under the law of the State of South Carolina. Mr. Lippincott denies that he was given notice of the employer's policy which it is using as a basis for his discharge and further denies the policy is reasonable as applied to him.

Further, this letter shall serve as notice that Mr. Lippincott has retained our firm to represent him in the above-referenced matter. I request that all correspondence be directed to our office (843-413-1013) and also that the contents of his file be faxed to us at your earliest convenience.

SC Employment Comm.

MAR 14 2011

Received Benefits Div.



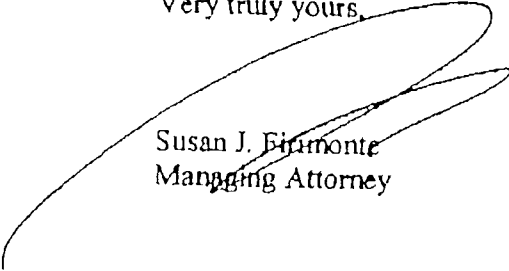
South Carolina
BAR FOUNDATION
Commitment to the Profession



Carl F. Muller - Chairman; Jim Stuckey - Vice Chairman; Nora Harris - 1st Vice Chair; Mariadolores Valentin - Secretary; Angela DeAnne Rowe - Treasurer

Please call me at (843) 413-9500 if I can be of any assistance.

Very truly yours,


Susan J. Birmonte
Managing Attorney

SJF/

SCDEW

MAR 09 2011

Lower Authority Appeals

SC Employment Comm.

MAR 14 2011

Received Benefits Div.

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

1 UCB-103
REV. May 2007

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

P.O. BOX 995, COLUMBIA, S.C. 29202

1 WILLIAM E LIPPINCOTT

DATE OF THIS NOTICE 03/03/11

1 1222 SPRINGBRANCH RD

1 FLORENCE SC 29501

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS	
WILLIAM E LIPPINCOTT				[REDACTED]	01/30/11	05/07/11	
LO NO	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS
210	I	01	\$ 280.00	\$ 7280.00	\$ 3920.00	\$ 3360.00	01/29/12

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

1 _____ You are eligible for benefits from the above effective date.

1 ☒ You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

1 YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT BONA FIDE EMPLOYER FOR VIOLATION OF
1 COMPANY POLICY. POLICIES VIOLATED WERE NOT UNREASONABLE AND YOU DID HAVE OPPORTUNITY TO HAVE
1 KNOWLEDGE OF THE COMPANY POLICIES. FAILURE TO COMPLY WITH COMPANY POLICIES CONSTITUTES DISCHARGE
1 FOR CAUSE IN CONNECTION WITH THE WORK UNDER THE SOUTH CAROLINA CODE, SECTION 41-35-120(2). YOU
1 ARE DISQUALIFIED FOR 14 WEEKS. YOUR MAXIMUM BENEFITS ARE ALSO REDUCED BY 14 TIMES YOUR WEEKLY
1 BENEFIT AMOUNT.

1 YOU VIOLATED THE ASSOCIATE ARRESTS AND CONVICTIONS POLICY.

1 _____ LAST SEPARATION FROM NON-LIABLE EMPLOYER

UI CLAIMS ADJUDICATOR

1 MAILING DATE 03/04/2011

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE, OR BY MAIL, ADDRESSED TO THE "APPEAL TRIBUNAL," P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202 FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE.

TRANSCRIPT OF TESTIMONY

**SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT &
WORKFORCE**

Columbia, South Carolina

Transcript of Testimony

Before

Erika Davis, Administrative Hearing Officer

William Lippincott, Jr.	)	CLAIMANT
1222 Springbranch Road	)	
Florence, SC 29501	)	
Claimant SSN: xxx-xx-5138	)	

Wal-Mart Associates Inc.	)	LIABLE EMPLOYER
C/O Talx UC Express	)	
PO Box 182366	)	
Columbus, OH 43218	)	

PLACE OF HEARING: SC Dept of Employment & Workforce
1558 West Evans Street
Florence, South Carolina

DATE OF HEARING: April 12, 2011

APPEARANCES:

For Claimant:	In Person
	One Witness
	Attorney
For Employer:	None

TESTIFYING WITNESSES

CLAIMANT:

William Lippincott, Jr.

William Lippincott, Sr.

Susan Firimonte, Esq.

EMPLOYER WITNESSES:

None

1 Before: Erika Davis, Administrative Hearing Officer

2 **HEARING OFFICER'S PREAMBLE.**

3 **ALL WITNESSES SWORN.**

4 HEARING OFFICER: Initially I will ask questions and you will have the
5 opportunity to answer those questions and to provide any additional testimony that
6 is relevant to your case. At the conclusion of my questioning your attorney will
7 have the opportunity to ask any additional questions that she feels may be
8 necessary. At the conclusion of your testimony, Mr. Lippincott, I will take
9 testimony from your father. Your attorney will also have the opportunity after my
10 questioning to ask any additional questions that she may have. If there are any
11 documents or exhibits that you feel should be considered in the case, Ms.
12 Firimonte, they need to be given to me during the testimony as those documents
13 become relevant, okay?

14 CLAIMANT ATTORNEY: Okay.

15 HEARING OFFICER: Are there any questions regarding the issue or the
16 procedure of this hearing before I go forward with testimony? Ms. Firimonte?

17 CLAIMANT ATTORNEY: No.

18 HEARING OFFICER: Mr. Lippincott, do you have any questions?

19 CLAIMANT: No, ma'am.

20 HEARING OFFICER: Now, Mr. Lippincott, Sr.?

21 CLAIMANT WITNESS: No.

22 HEARING OFFICER: All right. You will be notified of the decision as soon as
23 possible. That decision is mailed to the address that I have on record. Mr.

TESTIMONY OF WILLIAM E. LIPPINCOTT

1 Lippincott, I'm showing your address as, 1222 Springbranch Road, and that's in
2 Florence, South Carolina 29501, is that correct?

3 CLAIMANT: Yes, ma'am.

4 HEARING OFFICER: And your telephone number; 843-665-2567?

5 CLAIMANT: Yes, ma'am.

6 HEARING OFFICER: Thank you. Now, Ms. Firimonte, I'm showing your
7 address 320 South Coit Street, Florence, South Carolina 29501, is that correct?

8 CLAIMANT ATTORNEY: That is.

9 HEARING OFFICER: And your telephone number area code 843-413-9500?

10 CLAIMANT ATTORNEY: That's correct.

11 HEARING OFFICER: With a fax of area code 843-413-1013?

12 CLAIMANT ATTORNEY: Right.

13 HEARING OFFICER: Thank you. Mr. Lippincott, if you would, would you
14 please state your name for the record spelling your first and last name.

15 CLAIMANT: William; W-I-L-L-I-A-M E; which is for Edward;
16 E-D-W-A-R-D, Lippincott; L-I-P-P-I-N-C-O-T-T, Junior.

17 HEARING OFFICER: Thank you, Mr. Lippincott. Ms. Firimonte, I have in my
18 hand the determination that found Mr. Lippincott disqualified from receiving
19 benefits for 14 weeks. Is this the determination that is under appeal?

20 CLAIMANT ATTORNEY: That is.

21 HEARING OFFICER: Is this the only determination that is being appealed?

1 CLAIMANT ATTORNEY: That is.

2 HEARING OFFICER: Is there any objection to me entering the document into
3 the record to show the purpose of this appeal today?

4 CLAIMANT ATTORNEY: No objection.

5 HEARING OFFICER: Then without objection I will enter it as Agency Exhibit
6 Number One, it is a one page Claim's Adjudicator's determination that holds the
7 claimant disqualified from receiving benefits for 14 weeks, also reducing his
8 maximum benefits by 14 times his weekly benefit amount based upon a finding
9 that he was discharged for violation of company policies. Mr. Lippincott, I show
10 that you worked for Wal-Mart as a sales associate, is that correct?

11 CLAIMANT: Yes, ma'am.

12 HEARING OFFICER: And you were employed with the company from May the
13 11th, 1992 to January 31st of 2011, is that correct?

14 CLAIMANT: Yes.

15 HEARING OFFICER: On January 31, 2011, were you discharged from your job
16 or did you voluntarily quit?

17 CLAIMANT: I was...I was let go.

18 HEARING OFFICER: Okay. And why were you let go?

19 CLAIMANT ATTORNEY: Just tell what you were told.

20 HEARING OFFICER: You need to tell me, sir.

21 CLAIMANT: I was let go because I had got enrolled into PTI.

22 HEARING OFFICER: Why were you enrolled in PTI?

1 CLAIMANT: (No response)

2 HEARING OFFICER: You can tell me.

3 CLAIMANT: I was in...I was in...I was involved in a bad
4 situation in another county.

5 HEARING OFFICER: Were you arrested for that situation?

6 CLAIMANT: For...for a couple...for a couple hours for
7 questioning. And I was...I was let out on a PR bond.

8 HEARING OFFICER: So you were arrested, and then questioned, and then let
9 out?

10 CLAIMANT: Yes.

11 HEARING OFFICER: Okay. Were you working when you were arrested?

12 CLAIMANT: I was on...I was on vacation at the time.

13 HEARING OFFICER: When you were arrested, did you notify Wal-Mart of
14 your arrest?

15 CLAIMANT: No.

16 HEARING OFFICER: And what were you arrested for?

17 CLAIMANT: Access...I want to say accessory after the fact, or
18 accessory before the fact.

19 HEARING OFFICER: Accessory to what?

20 CLAIMANT: Umm...

1 CLAIMANT ATTORNEY: Just tell her what you know. If you don't know
2 exactly, just tell her as best you know.

3 HEARING OFFICER: Thank you, Ms. Firimonte.

4 CLAIMANT: I was in...I was involved with two other people
5 in...in Lynchburg. I had droven (sic) to...I had droven to a building and they was
6 gonna...they was gonna steal some copper.

7 HEARING OFFICER: So after you were arrested, and you were questioned,
8 then you were let out. When were you scheduled to go back to work after your
9 vacation? You said you were on vacation, so when were you scheduled to go back
10 to work?

11 CLAIMANT: After my...after my vacation.

12 HEARING OFFICER: Do you remember what day that was?

13 CLAIMANT: I would need a...I would need a calendar so I can
14 look at it.

15 HEARING OFFICER: I have a calendar. [UNCLEAR] and this is kind of an
16 odd calendar. So 2011 goes down the center, January being in the second...the top
17 of the second column.

18 CLAIMANT: Let's see, I went...I went on vacation July...I want
19 to say...I want to say the...I want to say July the...July the 12th.

20 HEARING OFFICER: Okay. And what day were you arrested?

21 CLAIMANT: It was on Monday, July the 12th.

22 HEARING OFFICER: So it was on the day you went on vacation?

23 CLAIMANT: Yes.

1 HEARING OFFICER: Of 2010?

2 CLAIMANT: Yes.

3 HEARING OFFICER: Okay. From July 2010, to the time you were separated in
4 January of 2011, had anything else happened in between that time?

5 CLAIMANT: I did...I did have a...I did have a...I did have a...I
6 did have a...I did have a drug problem. And I had admitted it to my work that I
7 had a drug problem and I need to be...that I needed to get some help.

8 HEARING OFFICER: When did you...when did you admit that and ask for
9 help?

10 CLAIMANT: I want to say...I want to say about three...probably
11 about three, four weeks after...after I was...after I was arrested that month.

12 HEARING OFFICER: So that would have been the end of July, beginning of
13 August?

14 CLAIMANT: Yes.

15 HEARING OFFICER: Okay. And were you given the help when you requested
16 the help for your drug problem?

17 CLAIMANT: Yes.

18 HEARING OFFICER: Okay. And after that, after you were...requested the
19 help, and were given the help, did anything else happen after that up till January
20 when you were let go?

21 CLAIMANT: What do you mean?

22 HEARING OFFICER: Had any...had there been any other things that
23 happened?

1 CLAIMANT: No.

2 HEARING OFFICER: So from July to January you weren't arrested, you
3 weren't...

4 CLAIMANT: No.

5 HEARING OFFICER: ...questioned? When were you involved in this PTI
6 program?

7 CLAIMANT: I had got involved in PTI in...in January.

8 HEARING OFFICER: In January? And this was for the incident that occurred
9 when you were arrested in July, right?

10 CLAIMANT: Yes.

11 HEARING OFFICER: Okay. When you were put...put into the PTI program,
12 did you tell Wal-Mart at that time that you had to attend this PTI?

13 CLAIMANT: Yes.

14 HEARING OFFICER: Is that when they told you they were going to let you go?

15 CLAIMANT: They had...they had suspended me for...they had
16 suspended me for three weeks. They had suspended me for three weeks then they
17 had called me back in on the 31st, and that's when they had handed me a policy
18 saying since I was involved in the PTI they would have to terminate my
19 employment.

20 HEARING OFFICER: Okay. Were you aware of this policy that they handed
21 you...

22 CLAIMANT: No, ma'am.

1 HEARING OFFICER: ...prior to this incident?

2 CLAIMANT: No.

3 HEARING OFFICER: Okay. Were...had anybody told you during the time,
4 during your employment that if you were arrested or placed into PTI program that
5 it could result in you being terminated from your employment?

6 CLAIMANT: No.

7 HEARING OFFICER: Prior to the you telling them that you had enrolled in this
8 PTI program, had anybody told you that your job was in jeopardy?

9 CLAIMANT: No.

10 HEARING OFFICER: When you were arrested did you miss any time from
11 work?

12 CLAIMANT: No.

13 HEARING OFFICER: And your admittance of your drug problem, that didn't
14 have anything to do with you being let go...

15 CLAIMANT: No.

16 HEARING OFFICER: ...is that correct? They didn't say anything about that
17 when you were let go?

18 CLAIMANT: No.

19 HEARING OFFICER: Okay. When you were hired with Wal-Mart, were you
20 given a copy of their policies and rules?

21 CLAIMANT: Back in '92, not at that time, no.

1 HEARING OFFICER: Other than when you were discharged and they gave you
2 the policy, had they gone over any new changes or policies with you?

3 CLAIMANT: No.

4 HEARING OFFICER: All right. I don't believe I have any additional questions.
5 Do you have anything else at this time Ms. Firimonte?

6 CLAIMANT ATTORNEY: Yes, I do.

7 HEARING OFFICER: You may.

8 CLAIMANT ATTORNEY: Bill, is this the policy that you were
9 handed...handed to you by the person at Wal-Mart that discharged you?

10 CLAIMANT: Yes.

11 CLAIMANT ATTORNEY: And that's the reason they said this policy is why
12 you were let go?

13 CLAIMANT: Yes.

14 CLAIMANT ATTORNEY: And can you read what it says on the top of the
15 policy?

16 CLAIMANT: "Associates Risk Convictions Management
17 Guideline."

18 CLAIMANT ATTORNEY: Okay. And did you have a chance to read this
19 policy?

20 CLAIMANT: No.

21 CLAIMANT ATTORNEY: I'd like to offer this as an exhibit. That policy, all
22 right, clearly does not provide for discharge for an employee just because they

1 enter PTI. The policy provides for determination of whether the conduct or the
2 criminal action was work related. If it's work related they get suspended. If
3 they're suspended because it's work related and they do PTI, they do get
4 discharged. But on page two it clearly says if it was not work related...and let's
5 see, is allowed to continue working pending the outcome of the charges is found
6 guilty of a job related then they're terminated. But if it was the outcome of the
7 charges are found guilty, non-job related, then...and they have to go to jail, then
8 they get suspended just for when they're in jail without pay. But it doesn't say
9 they get terminated. So I don't think they followed their own policy.

10 HEARING OFFICER: Let me enter this into the record as Claimant Exhibit
11 Number One. It is a two page document regarding Associates Risk Convictions
12 Management Guidelines. Do you have any other questions for Mr. Lippincott?

13 CLAIMANT ATTORNEY: Just a couple.

14 HEARING OFFICER: You may go ahead.

15 CLAIMANT ATTORNEY: Bill, in your working for Wal-Mart, did you get
16 regularly reviewed and evaluated?

17 CLAIMANT: Yes.

18 CLAIMANT ATTORNEY: And you got raises?

19 CLAIMANT: Yes.

20 CLAIMANT ATTORNEY: And so from your starting pay of minimum wage,
21 what was your ending pay?

22 CLAIMANT: Thirteen-twenty six.

23 CLAIMANT ATTORNEY: Did you...were you ever given...given written
24 warnings...

TESTIMONY OF WILLIAM E. LIPPINCOTT, SR.

1 CLAIMANT: No.

2 CLAIMANT ATTORNEY: ...for any problems? Every suspended before this
3 incident?

4 CLAIMANT: No.

5 CLAIMANT ATTORNEY: Were you a good employee?

6 CLAIMANT: Yes.

7 CLAIMANT ATTORNEY: And the whole point of doing the PTI was what?
8 So that you wouldn't risk going to jail?

9 CLAIMANT: Correct.

10 CLAIMANT ATTORNEY: So you could keep your job?

11 CLAIMANT: Yes.

12 CLAIMANT ATTORNEY: And have you ever gotten into trouble with the law
13 before?

14 CLAIMANT: No.

15 CLAIMANT ATTORNEY: That's all the questions I have for this witness.

16 HEARING OFFICER: Thank you. Mr. Lippincott, Sr.

17 CLAIMANT WITNESS: Yes.

18 HEARING OFFICER: If you would, would you please state your name for the
19 record spelling your first and last name.

1 CLAIMANT WITNESS: It's William Lippincott. William; W-I-L-L-I-A-M E
2 Lippincott; L-I-P-P-I-N-C-O-T-T.

3 HEARING OFFICER: Thank you, Mr. Lippincott. And your relationship to Mr.
4 Lippincott?

5 CLAIMANT WITNESS: I'm his father.

6 HEARING OFFICER: All right. Mr. Lippincott, were you with your son when
7 he was terminated from his employment?

8 CLAIMANT WITNESS: Yes, I was.

9 HEARING OFFICER: Okay. And you can tell me what was said during the
10 termination of your son?

11 CLAIMANT WITNESS: Well, maybe I said, "Yes," and the answer was yes, but I
12 was not in the room.

13 HEARING OFFICER: Okay.

14 CLAIMANT WITNESS: What happened inside the room I couldn't verify it. But
15 after the termination, the store manager, Kay, came out into the lobby and she
16 handed me a copy of that PTI notice [UNCLEAR, both speaking].

17 HEARING OFFICER: The policy?

18 CLAIMANT WITNESS: Yes.

19 HEARING OFFICER: Okay.

20 CLAIMANT WITNESS: And she pointed out she had highlighted in yellow
21 marking pen, she highlighted the PTI section. And she said, "That's the only
22 reason that he is being terminated." She said, "His work record is perfect. It's not

1 his job related..." and she says, "It is his participation in a PTL." And that was the
2 store manager.

3 HEARING OFFICER: Okay, thank you. Do you have anything else Mr.
4 Lippincott?

5 CLAIMANT WITNESS: [UNCLEAR] My son has been through rehabilitation,
6 having a handicap school for the state of Virginia. And he also as a...as an infant
7 he went to The King's Daughters, the Children's Hospital...the Children's
8 Hospital of King's Daughter in Norfolk, and he was classified as retardation.
9 There's different degrees of retardation, but he is...he does have a problem. I've
10 never had no problems in my life with him as a son except for this one instance.
11 He's served 18 years, 72 quarters at Wal-Mart with an unblemished record. And
12 all of a sudden my wife and I we had a plan [UNCLEAR] and we felt very secure
13 that he had a job. And then over...overnight his job was gone with no indication
14 of why or nothing.

15 HEARING OFFICER: Thank you, Mr. Lippincott. Let me just make sure I have
16 the...when your son was arrested it was in July for the accessory, is that correct?

17 CLAIMANT WITNESS: That's accessory before the fact. He was [UNCLEAR,
18 both speaking].

19 HEARING OFFICER: And that was in July, correct?

20 CLAIMANT WITNESS: Best...best of my knowledge.

21 HEARING OFFICER: Okay, thank you. I don't believe I have any other
22 questions. Do you have anything else Mr. Lippincott?

23 CLAIMANT WITNESS: No. I think that's probably the only thing I can tell you.

24 HEARING OFFICER: Thank you. Ms. Firimonte, do you have any questions
25 for Mr. Lippincott?

1 CLAIMANT ATTORNEY: No, I don't have any further questions.

2 HEARING OFFICER: Anything else Mr. Lippincott? Do you have any further
3 testimony?

4 CLAIMANT: No, ma'am.

5 HEARING OFFICER: Do you have any additional questions?

6 CLAIMANT ATTORNEY: No. I believe the policy speaks for itself. And
7 what they highlighted down here was would happen to someone if they were
8 suspended without pay because it was job related. So I don't believe that they had
9 [UNCLEAR] their own policy correctly.

10 HEARING OFFICER: I do have one question. I want to make sure I have the
11 date correct. Mr. Lippincott was arrested in July of 2010, is that correct?

12 CLAIMANT ATTORNEY: Yes.

13 HEARING OFFICER: And offered PTI in January, is that...?

14 CLAIMANT ATTORNEY: Right.

15 HEARING OFFICER: Okay.

16 CLAIMANT ATTORNEY: Were you offered it sooner?

17 CLAIMANT: No, I...I had...I had to go to court...I had to go to
18 court in September.

19 HEARING OFFICER: Okay.

20 CLAIMANT: For a...what do you call it? A preliminary hearing
21 against the...against the other...against the other two people that I was involved
22 with. And they had problems getting the other two people that I was involved with

1 from the...from the jail over to the courthouse. And the solicitor...the solicitor
2 had gave me enough time to run over there to his office to apply for PTI.

3 HEARING OFFICER: That was in September?

4 CLAIMANT: Yes.

5 HEARING OFFICER: Okay. So you applied in September and you enrolled in
6 January, is that correct?

7 CLAIMANT: Yes.

8 HEARING OFFICER: Okay. All right, thank you. Anything else?

9 CLAIMANT ATTORNEY: No, that's all, Your Honor.

10 HEARING OFFICER: There being no further questions, and no further
11 testimony, I declare this hearing closed.

12 **HEARING CLOSED.**

STATE OF NEW JERSEY)
)
COUNTY OF: MIDDLESEX)

This is to certify that the above is a true and correct transcript of recorded testimony transcribed to the best of my ability.



Lois Szirko

SWORN to before me this the
3rd day of September, 2009
Mary Farley (LS)

Mary Farley
Notary Public
New Jersey
My Commission Expires 11/05/2012

AGENCY EXHIBITS

1 UCB-103
REV. May 2007

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
P.O. BOX 995, COLUMBIA, S.C. 29202

EXHIBIT A-1

DATE OF THIS NOTICE 03/03/11

1 WILLIAM E LIPPINCOTT
1 1222 SPRINGBRANCH RD
1 FLORENCE SC 29501

108 EXHIBIT
A#:

FILE NO: 1104347

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS	
WILLIAM E LIPPINCOTT					01/30/11	05/07/11	
ID NO	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS
210	I	01	\$ 280.00	\$ 7280.00	\$ 3920.00	\$ 3360.00	01/29/12

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

- 1 _____ You are eligible for benefits from the above effective date.
- 1 ☒ You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

1 YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT BONA FIDE EMPLOYER FOR VIOLATION OF
1 COMPANY POLICY. POLICIES VIOLATED WERE NOT UNREASONABLE AND YOU DID HAVE OPPORTUNITY TO HAVE
1 KNOWLEDGE OF THE COMPANY POLICIES. FAILURE TO COMPLY WITH COMPANY POLICIES CONSTITUTES DISCHARGE
1 FOR CAUSE IN CONNECTION WITH THE WORK UNDER THE SOUTH CAROLINA CODE, SECTION 41-35-120(2). YOU
1 ARE DISQUALIFIED FOR 14 WEEKS. YOUR MAXIMUM BENEFITS ARE ALSO REDUCED BY 14 TIMES YOUR WEEKLY
1 BENEFIT AMOUNT.

1 YOU VIOLATED THE ASSOCIATE ARRESTS AND CONVICTIONS POLICY.

1 _____ LAST SEPARATION FROM NON-LIABLE EMPLOYER

UI CLAIMS ADJUDICATOR

1 MAILING DATE 03/04/2011

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE, OR BY MAIL, ADDRESSED TO THE "APPEAL TRIBUNAL," P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202. FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE.

WIRE

My Favorites

CLAIMANT EXHIBITS

S:000830

Launch

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WIRE - WIREPORTAL

Business Support
 Merchandising
 Operations
 Retail Deals
 Small Formats

People Support
 Compensation
 Global Learning
 Management System
 HR Services
 Training and Education

Facility Support
 Asset Protection
 Compliance
 Facilities Management
 Financial Shared
 Services
 Food Safety & Health
 Marketing
 Safety
 Security Integration
 Services
 Store Planning

Corporate Support
 Global Risk
 Management
 Investigations
 Labor Relations
 Legal

Policies
 By Category
 By Title
 Recent Changes

Forms
 By Title

Procedures/Guides
 By Category - Walmart
 Stores US

Tools and Reports

Approved
 Websites

Printer friendly

EXHIBIT C-2**Associate Arrests and Convictions Management Guidelines****Effective: July 19, 2010**

These guidelines are a management supplement to Walmart's Associate Arrests and Convictions Policy. They apply to supervisors and managers who work for Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States and Puerto Rico (Walmart).

You must follow the procedures outlined in these guidelines.

Review the charges

Do not take action until you have reviewed all of the facts and contacted your HR representative or Legal.

If an associate is arrested and charged with a felony or misdemeanor the Facility Manager or Asset Protection will conduct a review to determine appropriate action. A proper review consists of the following:

1. Call the police or prosecutor's office to verify the arrest and charges. Obtain as much information as possible concerning the arrest and the conduct that led to the arrest. Obtain a copy of the written charges, if possible.
2. Determine if the alleged conduct is job-related (i.e. does the conduct indicate that the associate is unfit to continue working in his/her position). Examples include, but are not limited to: arrests for theft, drug-related charges or acts of violence by any associate.

The factors to consider are:

- The nature and seriousness of the offense.
- The position held by the associate.
- Any other relevant or unusual circumstances.

It is generally not appropriate to suspend an associate on the basis that the arrest will cause adverse publicity or adverse reaction to the associate's arrest if there is no other business justification for the suspension.

NOTE: An arrest for DWI is not job-related if the associate does not operate a motor vehicle in the performance of his/her job duties.

Outcome of the review

If it is determined that the conduct is not job-related, the associate will be allowed to continue working.

If it is determined that the conduct is job-related, do the following:

1. Interview the associate and ask him/her to explain the circumstances of the arrest and any relevant information he/she thinks should be considered, including the names and phone numbers of anyone who can support his/her explanation. Obtain a written statement from the associate.
2. If the associate refuses to provide any information, document the time and date of the interview and that the associate refused to provide any information concerning his/her arrest, including the reason for the refusal if known. Proceed with the review as if the associate denied any wrongdoing.
 - After interviewing the associate if he/she denied the charges, make a reasonable effort to determine whether the associate's explanation is credible. If an associate's explanation can be easily confirmed (i.e. by a phone call to an unbiased witness or the police), make a reasonable effort to verify the claim if the associate has provided the necessary information (names, phone numbers, etc.). Document all attempts made to verify the associate's claim.
 - Do not take action until you contact your Human Resource Manager, Corporate Associate Relations, or Legal and review all of the facts. The associate should be suspended without pay pending the outcome of the charges if and only if the conduct for which the associate was arrested is job-related.

NOTE: Management associates suspended without pay must receive their salary through the end of their current pay week.

Determining appropriate action after adjudication

If the associate was suspended without pay pending the outcome of the charges, once the associate's charges are adjudicated, take appropriate action as follows:

- If the associate is found guilty, pleads guilty or pleads no contest to the charge for which he/she was arrested, the associate's employment is to be terminated.
- If the associate is found not guilty within 12 months from the suspension date, the associate will be returned to work. The associate will not receive compensation for the time he/she was suspended.
- If the associate is allowed by the court to participate in a deferred prosecution program (i.e., by satisfying conditions set by the court, all charges against the individual are dropped), the associate's employment is to be terminated.
- If the associate enters into a plea-bargaining agreement (pleads guilty to a lesser charge) or is

Resources

California	Massachusetts
Hawaii	Michigan
Illinois	Ohio
	Wisconsin

244 EXHIBIT

C#: 2

FILE NO: 1104847

found guilty of different charges than those of the original arrest, determine what the associate was actually convicted of and contact your HR representative or Legal for direction. You should be prepared to discuss whether the conviction makes the associate unfit to continue in his/her position.

If an associate, who was allowed to continue working pending the outcome of charges, is found guilty of a job-related offense, the associate's employment is to be terminated.

If an associate was not suspended pending the outcome of charges, is found guilty of a non-job-related offense and is required to serve jail time, the associate may be suspended without pay.

Criminal drug statute

If an associate is convicted under any criminal drug statute, s/he will be terminated. If an associate fails to notify the company of any arrest or conviction under any criminal drug statute within three days after the arrest or conviction, s/he will be terminated.

This information does not create an express or implied contract of employment or any other contractual commitment. Walmart may modify this information at its sole discretion without notice, at any time, consistent with applicable law. Employment with Walmart is on an at-will basis, which means that either Walmart or the associate is free to terminate the employment relationship at any time for any or no reason, consistent with applicable law.

Last Modified: September 10, 2010

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REQUEST FOR DETERMINATION OF INSURED STATUS

NAME: WILLIAM E LIPPINCOTT		SSN: [REDACTED]	BYE: 01/29/12
CLAIMSTAKER ID: CBRGR	LO #: 210	FILED: 02/04/11	EFF DATE: 01/30/11
MAILING ADDRESS: 1222 SPRINGBRANCH RD			
CITY: FLORENCE		STATE: SC	ZIP: 29501-8536
OTHER NAME:			

☒ 1-UI	☐ 4-UI/UCFE/UCX	☐ 7-UCX	☒ NEW	☐ TRANSITIONAL
☐ 2-UI/UCFE	☐ 5-UCFE	☐ 8-CW	☐ ADDITIONAL	☐ R-ADD
☐ 3-UI/UCX	☐ 6-UCFE/UCX	☐ OTHER	☐ CONTINUED	

BONA FIDE EMPLOYER NAME & PAYROLL ADDRESS INFORMATION:		DATES OF EMPLOYMENT:	
NAME: WAL-MART ASSOCIATES INC			
STREET: C/O TALX UC EXPRESS, PO BOX 182366		FROM:	TO:
		05/05/92	01/01/11
CITY: COLUMBUS	ST: OH	ZIP: 43218-2366	EMP. ACCT. #: 316582

BONA FIDE EMPLOYER LOCAL ADDRESS INFORMATION:			
STREET:			
CITY: FLORENCE	ST: SC	ZIP:	PHONE #: (843) 664-2020

SEPARATION REASON:	☐ LOW	☐ VQ	☒ DISCHARGE	☐ STILL WORKING
--------------------	------------------------------	-----------------------------	---	--

ISSUE CODES: 01

LIABLE EMPLOYER INFORMATION:		DATES OF EMPLOYMENT:	
NAME:			
EMP. ACCT. #		FROM:	TO:
JOB LOCATION (CITY/STATE):			

SEPARATION REASON:	☐ LOW	☐ VQ	☐ DISCHARGE	☐ STILL WORKING
--------------------	------------------------------	-----------------------------	------------------------------------	--

NARRATIVE REASON FOR SEPARATION FROM LIABLE EMPLOYER:

DISCHARGE FOR CAUSE FACT FINDING

UCB-102DC
8/99
08122

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

UNEMPLOYMENT INSURANCE DIVISION

DISCHARGED FOR CAUSE

FACT FINDING

SS Employment Comm.

L O No 2100

FEB 24 2011

SOCIAL

CLAIMANT'S

NAME William Lippincott

RECEIVED BENEFIT DIV.

1 Most recent BONA FIDE employer (Name of Company) Wal-Mart Associates, Inc

Address of Company PO BOX 182366 Columbus OH 43218-2366

Telephone No of Company 800-829-1510

Name of individual at Company to contact for more information Lora Perry

2 Dates of employment with this company beginning 5/11/1992 ending 1/31/2011

Hours worked from 7 am to 4 pm or which shift for 5 days per week

Ending salary \$ 13.26 per hour Occupation Lawn & Garden Sales

3 CLAIMANT'S STATEMENT

a I was discharged by (Name of Person) Kay Liles Title Store Manager

because (Include reason for discharge on that particular day) I was enrolled in a Pre-Trial Intervention Program I got into trouble outside of the store hours and I was arrested Kay Liles told me because I was in the pre-trial intervention program she had to let me go

Employer's reply was read to claimant and he said the employer's reply sounded about right, so he agreed with what was read to him

b If you were discharged for violation of a company rule, please explain rule and violation

c Has your employer ever warned you about the condition causing your discharge? Yes ☐ No ☒
If "Yes" when were you warned (Dates) and by whom?

d Did you discuss your discharge with your employer? Yes ☐ No ☒ If "Yes," with whom
What were the results of this discussion?

4 CLAIMANT'S CERTIFICATION I certify that the information stated herein is true I understand that the Law prescribes penalties for false statements for the purpose of securing benefits to which I am not entitled

CLAIMANT'S SIGNATURE

Via phone

DATE 2/23/2011

5 INTERVIEWER'S STATEMENT Employer Reply received? Yes ☒ No ☐ (If "Yes," all the employer's allegations not covered in claimant's initial statement must be presented to the claimant for rebuttal in item 7 If "No," or information was not adequate, was employer contacted to obtain adequate information?

Yes ☐ No ☐ If "No," give a date of attempt(s) to contact and explain

INTERVIEWER'S SIGNATURE

Lawrence Washington

DATE OF REPORT 2/23/2011

BENEFIT DEPARTMENT

REQUEST FOR INFORMATION
UNEMPLOYMENT INSURANCE BENEFITS

CLAIMANT'S NAME WILLIAM E LIPPINCOTT

SS # [REDACTED]

AME WORKED UNDER

DATE MAILED 2011-02-07

EMPLOYER'S ACCOUNT # 316582

EMPLOYER'S NAME WAL-MART ASSOCIATES INC
ADDRESS C/O TALX UC EXPRESS
PO BOX 182386
COLUMBUS, OH 43218-2386

RETURN WITHIN SCESC
12 DAYS OF THE 1888 W Evans Street
ABOVE DATE TO FLORENCE, SC 29501

FAX NUMBER 843-679-3956

This person has filed a claim for Unemployment Insurance Benefits and named you as a previous employer. Please explain the reason this person no longer works for you so that a determination can be made on eligibility for benefits. If you reply by letter, fax, or email, you must include all information requested, as well as the claimant's name and social security number. For instructions about responding by email, please go to our agency website at www.dew.sc.gov. YOU WILL RECEIVE A DETERMINATION ON HIS CLAIM ONLY IF IT IS FOUND THAT YOU ARE THE BONA FIDE AND/OR LIABLE EMPLOYER.

☒ CLAIMANT'S Reason for Separation DISCHARGED/FIRED/TERMINATED
ROSS MISCONDUCT

☒ A telephone interview has already been scheduled for the claimant on 02/23/2011 at 10:00 AM.
☐ Please respond by mail, fax, email, telephone, or personal visit to the local ESC office above.

SEPARATION INFORMATION

- ☐ LACK OF WORK (No additional written explanation is necessary.)
☐ DISCHARGED (Give specific reason.)

State company policy that claimant violated, if applicable, and describe the final incident leading to the separation.

List any warnings, note if verbal or written and give dates.

If discharged for absenteeism, list dates of absences.

- ☐ VOLUNTARILY QUIT (Give specific reason.)
☐ OTHER (Explain in detail.)

86 Employment Comm.

RECEIVED

FEB 21 2011

FEB 22 2011

Received Benefits Div.

86 Employment Security Comm
Florence Workforce Center

Dates of Employment FROM _____ TO _____
During all terms of employment, have you paid this claimant as much as \$ 2240.00 ☐ YES ☐ NO

If NO, how much have you paid this claimant in all terms of employment? \$ _____

Are you paying, or WILL YOU PAY, this claimant a pension or retirement pay? ☐ YES ☐ NO

If YES, what amount? \$ _____ PER _____

Did claimant contribute to pension plan? ☐ YES ☐ NO If YES, what percent? _____ %

EMPLOYER NAME _____ ACCOUNT NUMBER _____

EMPLOYER SIGNATURE ** _____ TITLE _____

TELEPHONE NUMBER _____ DATE _____

**FORM MUST BE SIGNED IN ORDER FOR INFORMATION TO BE CONSIDERED

TALX

B7

UCeXpress®

February 21, 2011

SCDEW WORKFORCE CENTER OFFICE 210
1558 WEST EVANS STREET
FLORENCE SC 29501-3372

86 Employment Comm.**FEB 24 2011**

FAX (843) 679-3955

Received Benefits Div

Re WILLIAM LIPPINCOTT
SS [REDACTED]

Account 316582-2
Employer WAL-MART ASSOCIATES, INC

Dear State Representative

This is in response to form UCB 101/NET 101, Request for Separation Information, dated February 7, 2011 with an effective date of February 7, 2011. In view of the following, we request relief of benefit charges and/or a determination on the claimant's eligibility.

First Day 05/11/1992 Last Day 01/31/2011

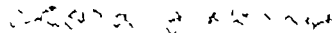
The claimant was discharged due to gross misconduct. Claimant was on a last chance agreement. He then had some legal issues and was discharged. Associates are made aware of the policies in orientation, computer based training, prior coachings and weekly meetings presented by the management team.

During all terms of employment, we have paid this claimant as much as \$ 1832.00. Please see the attached exit interview, orientation checklist confirming the employee was aware of policies, and other supporting documentation.

Be advised, TALX UC eXpress is a duly authorized agent empowered to act on behalf of the above employer. The determination, or any related correspondence, should be mailed to P O Box 182366, Columbus, OH 43218-2366.

For additional information, please contact our State Agency Response Center at (800) 829-1510.

Sincerely,



Lora Perry
Unemployment State Consultant

ATTACHMENT

I, MM, NCV

RECEIVED**FEB 22 2011**

UC Employment Security Comm
Florence Workforce Center

Exit Interview Form

Wal-Mart Stores, Inc. EXIT INTERVIEW

Printed From GAIN - GAIN # 2620996
Associate Information

Associate Name: WILLIAM LIPPINCOTT WIN: 100876290 SSN # [REDACTED]

Address: 1222 SPRINGBRANCH ROAD, FLORENCE, SC - 29501 US Phone: 8436652567

Facility #1630 Division # 1 Associate Type: Hourly

Last Worked Date: 01/31/2011 Effective Date: 01/31/2011

Last Position Held: Last Rate of Pay:

Company Property Information

The following applicable Wal-Mart property must be collected at the time of Exit Interview.

☒ Badge ☒ Discount Card ☐ Membership Card ☐ Company Issued Clothings ☒ Weight Belt

☒ Box Cutter ☐ Freezer Gear

Note: To be considered for re-employment, you must re-apply. Your previous work record with Wal-Mart Stores, Inc. will be reviewed.

The Company assumes no obligation to contact you for possible re-employment. Where state laws allow, a Neutral Reference will be provided to external employers seeking information regarding your employment with Wal-Mart Stores, Inc. Dates of employment and last position held is the only information that will be released.

Summary of Termination Information

Termination Type: Involuntary Termination

Eligible for Rehire: Non-Rehireable
Status:

Termination Reason: Gross Misconduct - Other

Last Day Worked: 01/31/2011

Manager Comments

Associate violated associate arrest and convictions policy

Signatures

Associate Name:	WILLIAM LIPPINCOTT	Date:		Electronic Acknowledge:	No
Supervisor Name:	MICHAEL JOHNSON	Date:	01/31/2011	Electronic Acknowledge:	Yes
Witness Name:	LAMECHA TIMMONS	Date:	01/31/2011	Electronic Acknowledge:	Yes

86 Employment Comm.

FEB 24 2011

Received Benefits Div.

RUN ON: 01/31/2011 At 16:11:45

WAL M MART STORES, INC.
Associate Attendance Report

STORE NO: 630

Supervisor: GREGORY DAPPLE

Associate: WILLIAM LIMPINCOTT
SSN: [REDACTED]

From: 01/31/2010
To: 01/31/2011

Unapproved Attendance Exceptions

Unapproved Absences

DATE	DESCRIPTION	REASON CODE	REMARKS	TOTAL ACTIVE ABSENCES (6 Month Rolling)
02/14/2010	Absence Occurrence	50		
07/24/2010	Absence caused by 2 Unapproved Tard	60		
01/02/2011	Absence caused by 3 Unapproved Tard	60		1

Unapproved Tardies

DATE	DESCRIPTION	REASON CODE	WORKING HOURS	APPLIES TO TARDY ABSENCE
02/24/2010	Inc Shift Occur	51		Y
07/22/2010	Inc Shift Occur	51		Y
11/05/2010	Inc Shift Occur	51		Y
01/02/2011	Inc Shift Occur	51		Y

Unapproved Left Earlys

DATE	DESCRIPTION	REASON CODE
02/05/2010	Incomplete Shift Occur	60
02/20/2010	Incomplete Shift Occur	60

Unapproved Attendance Exceptions Summary:
01/31/2010 to 01/31/2011

Total Active Attendance Exceptions (6 Month Rolling)	
Total Active Unapproved Absences	1
Total Active Unapproved Tardies	2
Total Active Unapproved Left Earlys	0
Total Active Unapproved Worked Shifts	0

Unapproved Attendance Exceptions Summary:
01/31/2010 to 01/31/2011

Tricking should not be based upon the following:
(Per Management Reference Only)

Total Unapproved Absences	1
Total Unapproved Tardies	2
Total Unapproved Left Earlys	2
Total Unapproved Worked Shifts	0

Approved Attendance Exceptions

Approved Absences

SS Equipment Comm
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RUN ON: 01/31/2011 AT 16:11:46

WAL * MART STORE, - INC.
Associate Attendance Report

STORE NO: 630

Supervisor: GREGORY GAMALE

Associate: WILLIAM LUTTIMOTT
SSN: [REDACTED]

From: 01/31/2010
To: 01/31/2011

05/01/2010 Business Need Absence 53
Approved Absences

DATE	DESCRIPTION	REASON CODE
05/02/2010	Business Need Absence	53
06/24/2010	Business Need Absence	53
06/25/2010	Business Need Absence	53
01/23/2010	Authorized Absence: non-FMLA	56
01/24/2010	Authorized Absence: non-FMLA	56
01/26/2010	Authorized Absence: non-FMLA	56
01/27/2010	Business Need Absence	53

Approved Tardies

DATE	DESCRIPTION	REASON CODE
01/04/2010	Business Need IncShift	54
04/14/2010	Business Need IncShift	54
05/15/2010	Business Need IncShift	54
05/21/2010	Business Need IncShift	54
06/20/2010	Business Need IncShift	54
11/20/2010	Business Need IncShift	54

Approved Left Earlys

DATE	DESCRIPTION	REASON CODE
01/21/2010	Business Need IncShift	51
04/22/2010	Business Need IncShift	51
05/15/2010	Business Need IncShift	51
05/21/2010	Business Need IncShift	51
06/11/2010	Business Need IncShift	51
10/11/2010	Business Need IncShift	51
12/11/2010	Business Need IncShift	51
12/12/2010	Business Need IncShift	51
01/04/2011	Business Need IncShift	51

Approved Non Scheduled Worked Shifts

DATE	DESCRIPTION	REASON CODE
01/04/2010	Authorized Worked Not Scheduled	49
06/11/2010	Authorized Worked Not Scheduled	49
10/11/2010	Authorized Worked Not Scheduled	49
10/17/2010	Authorized Worked Not Scheduled	49
10/18/2010	Authorized Worked Not Scheduled	49
10/21/2010	Authorized Worked Not Scheduled	49

TOTAL
ACTIVE
ABSENCES (6 Month Rolling)

APPLIES
TARDY
TAKEN
WOT-MCL

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RUN ON: 01/31/2011 AT 16:11:45

WAL-MART STORES, INC.
Associate Attendance Report

STORE NO: 438

Supervisor: GREGORY GARDLE

Associate:
SSN.

WILLIAM LINDENHOLT

From: 01/31/2010
To: 01/31/2011

Timeframe: Approved Attendance Exceptions Summary:
07/31/2010 to 01/30/2011
Active Attendance Exceptions (6 Month Rolling)
Total Active Approved Absences 1
Total Active Approved Tardies 1
Total Active Approved Left Earlys 4
Total Active Approved Worked Shifts 8

Timeframe: 01/31/2010 to 01/31/2011
Coaching Should not be Based upon the Following:
(For Management Reference Only)
Total Approved Absences 9
Total Approved Tardies 6
Total Approved Left Earlys 9
Total Approved Worked Shifts 10

SC Employment Comm.

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LEGEND:

- xx ABSENC: Associate did not work scheduled shift
- xx TARDY: Associate clocked in more than minutes after scheduled start time
- xx LEFT EARLY: Associate clocked out 30 minutes or more prior to scheduled leave time
- xx NON-SCHEDULED WORKED SHIFTS: Associate worked a shift not scheduled
- xx RECURRING: An absence tied/related to a previous absence, counted as part of the original absence (ex. Strep throat; day 1 is an absence; day 2 and 3 are recurring absences, tied to the original absence)
- xx APPLIES TOWARD 3 TARDY ACCUMULATED ABSENCE: tardies which count toward the Unapproved Absence calculation for three accrued Unapproved Attendance Exceptions (Absences, Tardies, Left Early, Non-Sched Worked shifts)
- xx ACTIVE ATTENDANCE EXCEPTIONS: Attendance exceptions which have occurred in the last six months, and are subject to Coaching if they are Unapproved

NOTE: Attendance Exceptions are reported for all Job codes in which Associate has worked within the Timeframe above

xx END OF JOB xx
Associate Attendance Report
REPORT: sas3341r RUN ON: 01/31/2011 AT 16:11:45

***** WAL-MART STORES, INC. CONFIDENTIAL *****

Maintenance

173

DEPARTMENT ORIENTATION CHECKLIST

William Lippincott
ASSOCIATE'S NAME

[REDACTED]
SOCIAL SECURITY #

OC Employment Comm.
FEB 24 2011

5/11/22
DATE OF HIRE

SUPERVISOR

Write the date the topic was completed
and Initial by associate and
Supervisor/Personnel Manager/Trainer
(Use "NA" if section does not apply)
STOC RUC

- 1 Explain the Company's Safety Statement of Policy and the importance placed on Risk Control (First page of the Safety Handbook)
2. Review Safety Handbook and how it applies in this department
3. Review proper Lifting Techniques including the "Green Zone" concept.
- 4 Explain how to wear the Back Support Belt and when it should be worn in department.
- 5 Review the Chemicals used (not sold) in the department and the following procedures:
 - * Explain Hazards associated with each Chemical used in department.
 - * Demonstrate the proper method of Handling each Chemical
 - * Demonstrate how to wear Personal Protective Equipment if required.
 - * Explain how to Clean Up a chemical spill and proper Disposal Procedures.
 - * Show location and Demonstrate the use of the Emergency Eye Wash Station.
- 6 Demonstrate safe operating procedures on all Power Equipment used in dept including
 - * Explain Assoc. Under 18 Years Old Are Prohibited From Operating Power Equi
 - * How to operate equipment and consistent use of Machine Guarding.
 - * Demonstrate how to wear Personal Protective Equipment if required
 - * Demonstrate proper Lock Out Procedures and when to lock out equipment.
 - * Demonstrate safe operating procedures when using the Baler / Trash Compactor.
 - * Demonstrate how to Clean equipment including Lock Out procedures if required.
- 7 Explain the Emergency Evacuation Process including exits and where to meet outside
- 8 Review the importance of maintaining Open Exits and never block with merchandise
9. Review the proper use of Box Cutters and policy on unauthorized cutters.
- 10 Explain Zone Defense and Safety Sweep and importance of cleaning up spills immediately.
11. Review the Bloodborne Pathogens exposure control plan
- 12 Show Ladder location(s) and explain dept policy on using Ladders
- 13 Demonstrate Proper Stacking of Merchandise, 18 inch clearance to water sprinkler heads
14. Review expectation of Good Housekeeping and Cleanliness.
15. Explain Safety Team activities and encourage ideas and participation
- 16 Review policy of Reporting Accidents / Incidents Immediately.

PLEASE COMPLETE THE CHECKLIST WITHIN 2 WEEKS OF HIRE/REASSIGNMENT DATE
(File the completed form in a binder and store in the Personnel Manager's office)

Coaching For Improvement

Coach # 384809 ~ Status is Expired ~ Mode is View

National ID# (SSN #)	First Name	M I	Last Name	Userid	Country	Division	Facility/Dept.
[REDACTED]	WILLIAM		LIPPINCOTT	WELIPPI	US	1	630

Type of Coaching:

The Level, Type, and Reason(s) displayed below were the original Level, Type, and Reason(s) selected for the coaching.

Level	Type	Reason(s)
Verbal	Misconduct	Safety/ Safe Work Practices

Observations of Associate's Behavior and/or Performance:

Associate was seen using the fork lift to push shopping carts in the parking lot by management. The associate then admitted that against his better judgement he was not to use the forklift to push shopping carts and that it was a safety hazard.

Impact of Associate's Behavior:

Endangered not only himself but customers and fellow associates.

Behavior Expected of Associate:

Use power equipment for its designed job only and only in a safe manner.

Next Level of Action:

The next level of action if behavior continues is: Written up to and including Termination.

Date, Time, and Place of Coaching:

Date Given	Time	Place	Personnel
2004-02-09	12:00 PM		

Expiration Date:

The expiration date of the coaching may be extended beyond 1 year if the Associate spent time on LOA.

Expiration Date
2005-02-10

Coaching Acknowledgements Finalized By:

	National Id# (SSN#)	First Name	Last Name	
Associate	6138	WILLIAM	LIPPINCOTT	
Associate Userid	WELIPPI			
Manager / Supervisor	6704	BRANDON	HINES	☒ I Acknowledge
Member of Mgmt	4602	FREDNA	BARNHILL	☒ I Acknowledge

Employment Comm-

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Coaching For Improvement

Coach # 4454608 ~ Status is Expired ~ Mode is View

National ID# (SSN #)	First Name	M.I	Last Name	Userid	Country	Division	Facility/Dept.
	WILLIAM		LIPPINCOTT	WELIPPI	US	1	630

Type of Coaching:

The Level, Type, and Reason(s) displayed below were the original Level, Type, and Reason(s) selected for the coaching

Level	Type	Reason(s)
Verbal	Performance	Break and Meal Periods

Observations of Associates Behavior and/or Performance:

on 09 16 2009 william fail too clock out before leaving to go home , he went the emergency room in the a m

Impact of Associate's Behavior:

loss of profits too company he could have been over paid .

Behavior Expected of Associate:

follow proper percadures for clocking in an out

Next Level of Action:

The next level of action if behavior continues is. Written up to and including Termination.

Date, Time, and Place of Coaching:

Date Given	2009-09-22	Time	11:30 AM	Place	personel office
------------	------------	------	----------	-------	-----------------

Expiration Date:

The expiration date of the coaching may be extended beyond 1 year if the Associate spent time on LOA

Expiration Date	2010-09-23
-----------------	------------

Coaching Acknowledgements Finalized By:

	National Id# (SSN#)	First Name	Last Name	
Associate	****188	WILLIAM	LIPPINCOTT	
Associate Userid	WELIPPI			
Manager / Supervisor	****7401	JANIE	WILLIAMS	☒ I Acknowledge
Member of Mgmt.	****8488	GAMMY	LEE	☒ I Acknowledge

86 Employment GAMM

FEB 24 2011

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Associate Arrests and Convictions Policy

36 Employment Comm.

FEB 24 2011

Updated July 10, 2010

Received Benefits Div.

State

Calif

Haw

Illinoi

At Walmart, we believe that our associates should be honest and law-abiding individuals. In addition, we are committed to the safety and well-being of our associates, customers and members. If you are arrested or convicted of a crime, it may indicate that you are unfit to continue working in your position. If you are arrested or convicted of a crime, you may be subject to suspension or termination in accordance with this policy.

This policy applies to all associates who work for Walmart Stores, Inc., or one of its subsidiary companies, in the United States (Walmart), except for associates who work in the following states (Click on the individual state for the policy applicable in that state)

Managers and supervisors should use the supplemental Associate Arrests and Convictions Management Guidelines for additional guidance in administering this policy.

Arrests and convictions

Review of charges

If you are arrested and charged with a felony or misdemeanor, we will conduct a review to determine whether the charges are job-related (i.e., examine the relationship of the charges to your position) and whether the alleged conduct that caused you to be arrested indicates that you are unfit for your job. If we determine the charges are not job-related, you will be allowed to continue working.

If we determine the alleged conduct is job-related, we will provide you with an opportunity to explain the surrounding circumstances. If we determine that the alleged conduct for which you were arrested indicates that you are unfit for your job, we will suspend you without pay, where allowed by state law, pending the outcome of the charges.

For newly hired associates, if we find charges which were brought against you prior to employment to be job-related, we will suspend you without pay, where allowed by state law, pending the outcome of the charges.

After adjudication

If we have suspended you without pay pending the outcome of charges, once your charges are adjudicated, we will determine the appropriate action. If you:

- Are found guilty, plead guilty or plead no contest to the charges for which you were arrested, we will terminate your employment.
- Are found not guilty within 12 months from the suspension date, you can return to work. You will not receive compensation for the time you were suspended unless we are required to do so by state law.
- Are allowed to participate in a deferred prosecution program (i.e., by satisfying conditions set by the court, all charges against you are dropped), we will terminate your employment.
- Are found guilty, plead guilty or plead no contest to charges different than the charges for which you were arrested, we will determine whether the conviction renders you unfit to continue in your position.

If we did not suspend you pending the outcome of charges and you are found guilty of a job-related offense that renders you unfit to continue in your position, we will terminate your employment.

Your responsibilities

If you are convicted under any criminal drug statute or you fail to notify us of any arrest or conviction under any criminal drug statute within three days after the arrest or conviction, we will terminate your employment.

blank calander

For more information

If you have questions or need further guidance, please contact your HR representative.

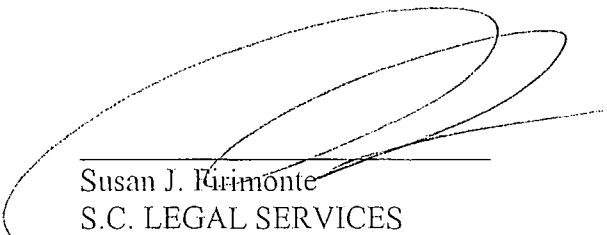
This information does not create an express or implied contract of employment or any other contractual commitment. Walmart may modify this information at its sole discretion without notice, at any time, consistent with applicable law. Employment with Walmart is on an at-will basis, which means that either Walmart or the associate is free to terminate the employment relationship at any time for any or no reason, consistent with applicable law.

Last Modified: September 10, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 24, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0343-AP

William E. Lippincott, Appellant,

v.

South Carolina Department of Employment and Workforce
and Wal-Mart Associates, Inc., Respondents.

FINAL BRIEF OF APPELLANT

March 1, 2011

**SOUTH CAROLINA
LEGAL SERVICES**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT DEPRIVE APPELLANT OF PROCEDURAL DUE PROCESS WHEN IT FOUND HE WAS DISCHARGED FOR CAUSE BASED SOLELY UPON A CONCLUSORY EX PARTE HEARSAY DOCUMENT WHICH WAS NEVER ADMITTED INTO THE RECORD IN THIS CASE?
- II. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN SHIFTING THE BURDEN OF PROOF TO THE APPELLANT ON THE ISSUE OF WHETHER HE WAS DISCHARGED FOR CAUSE UNDER THE STATUTE?
- III. DID THE ADMINISTRATIVE LAW COURT ERR IN HOLDING AS A MATTER OF LAW THAT APPELLANT WAS DISCHARGED FOR CAUSE CONNECTED WITH HIS EMPLOYMENT FOR ENTERING A PRE-TRIAL INTERVENTION PROGRAM FOR OFF-DUTY, OFF-SITE CONDUCT?
- IV. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN FAILING TO ASSESS WHETHER ITS INTERPRETATION AND APPLICATION OF THE EMPLOYER'S POLICY WHICH ELIMINATED THE CONNECTED TO EMPLOYMENT REQUIREMENT AND THE NEED FOR NOTICE OF THE EMPLOYEE WAS REASONABLE UNDER THE STATUTE?

STATEMENT OF THE CASE

The Appellant, William Lippincott (hereinafter "Lippincott"), received an initial agency determination finding that he was discharged "for violation of company policy" and therefore, disqualified from receipt of unemployment benefits. (R. p. 26) He appealed to the Appeal Tribunal, and a hearing was held on April 12, 2011. The employer left before the hearing and presented no evidence. (R. p. 22) The Administrative Hearing Officer, Erika S. Davis, affirmed the prior decision and disqualified Lippincott from receiving benefits for fourteen (14) weeks, together with a corresponding reduction in his maximum potential benefit amount. (R. pp. 21 - 22) Lippincott timely filed an Application for Leave to Appeal

to the Appellate Panel. (R. pp. 18 - 19) A hearing was held before the Appellate Panel on June 14, 2011, and on June 17, 2011, the South Carolina Department of Employment and Workforce ("Department") delivered Decision No. 2011-P-1346, which affirmed (by split decision) the decision of the Appeal Tribunal. (R. pp. 14 - 16) On June 24, 2011, Lippincott filed a Petition for Judicial Review of the Agency Action of the Department. (R. pp. 10 -13) An Order was issued by the Administrative Law Court (hereinafter: "ALC") on October 18, 2011 affirming the denial of benefits. (R. pp. 1 - 9) On November 7, 2011, Lippincott served the Notice of Appeal on the Department.

FACTS

Lippincott began working for Wal-Mart (hereinafter "Employer") on May 11, 1992 (R. p. 31, lines 12 -14) as a sales associate. He worked there nearly twenty years until the Employer discharged him on January 31, 2011 because he allegedly violated the company policy pertaining to associate arrests. (R. p. 35, lines 17-19). Specifically, the Decision of the Administrative Hearing Officer stated that Lippincott violated the company policy by entering into a deferred prosecution program. (R. p. 22)

Employer's policy on associate arrests provided that in the event of an associate arrest, there would be an investigation to determine whether (under the specific facts and circumstances) the conduct underlying the arrest was work related. If, after review, the conduct was found to be not work related, the associate was to be allowed to keep working. If the conduct was found to be work related, the employee was to be given an opportunity to explain the surrounding circumstances. In the case of work related conduct, the associate would be subject to possible suspension pending the outcome of the charges. In the case of

work related conduct, not only a guilty verdict or plea, but also entry into a deferred prosecution program would lead to termination (R. p. 46)

Lippincott testified that he had an arrest for accessory to theft before the fact by giving two men a ride to a building in another county while he was on vacation and that the incident itself had no relation to or bearing on his work. (R. p. 32, lines 3 - 12, p. 33, lines 4-6, p. 36, lines 10 - 12, p. 39, lines 12 - 14) Lippincott had never been arrested before. His father testified that Lippincott had been diagnosed with mental retardation as a child (R. p. 41, lines 6 - 8), that he "had no problems in my life with him as a son except for this one instance." (R. p. 41, lines 9 - 10) Because he had no previous arrests, Lippincott was offered and chose to participate in South Carolina's Pre-Trial Intervention (PTI) program. (R. p. 36, line 7 and p. 39, lines 12 - 14) It is undisputed that Lippincott was never advised that Employer had a policy against entering such a program. (R. p. 35, lines 20 - 22 and p. 36, lines 1 - 9) When Lippincott told Employer he was in the program, he was immediately suspended, then discharged. (R. p. 35, lines 11 - 19) Employer never asked Lippincott about the facts and circumstances surrounding his arrest and there is no evidence that any investigation was conducted by Employer to determine whether the conduct was work related. Rather, Lippincott was told by the Employer that he was discharged because the policy provides for discharge for any employee entering a PTI program. (R. p. 31, line 21) His witness also provided un rebutted testimony that immediately following the discharge:

(T)he store manager, Kay, came out into the lobby and she handed me a copy of that PTI notice ... (a)nd she pointed out she had highlighted in yellow marking pen... the PTI section (of the policy). And she said, "That's the only reason that he is being terminated." She said, "His work record is perfect. It's not his job related..." and she says, "It is his participation in a PTI." And that was the store manager. (R. p. 40, line 15 - 16, lines 20 to p. 41, line 2)

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT DEPRIVED APPELLANT OF PROCEDURAL DUE PROCESS WHEN IT FOUND HE WAS DISCHARGED FOR CAUSE BASED SOLELY UPON A CONCLUSORY EX PARTE HEARSAY DOCUMENT WHICH WAS NEVER ADMITTED INTO THE RECORD IN THIS CASE.

Because Employer elected not to attend the hearing in this matter, the only evidence and testimony presented was by Lippincott and his father. Both testified unequivocally that Employer admitted it was only discharging Lippincott because he entered a PTI program. (R. p. 31, line 21, p. 40, line 14 to p. 41, line 2)

The employer's actual company policy at issue, however, does not mandate discharge for all associates who are arrested for criminal offenses, or even those who enter a PTI program. Termination is not a consequence set out when the offense is not job related, even if you are sent to jail. (R. pp. 46 - 47) The policy makes clear that it is to be narrowly construed to limit sanctions to work-related offenses. There must be an investigation for a determination of whether the criminal offense at issue is work related. If, and only if, the offense is determined to be work related would any sanctions be applied to an employee. Even in that case, sanctions prior to a disposition of the charges are disfavored. Indeed, the policy cautions, "[i]t is generally not appropriate to suspend an associate on the basis that the arrest will cause adverse publicity or adverse reaction to the associate's arrest if there is no other business justification for the suspension." (R. p. 46) There was no evidence or testimony that any investigation was ever conducted in Lippincott's case. To the contrary, in contravention to its own policy, Employer suspended Lippincott upon being notified that he

was entering the PTI program. (R. p. 35, lines 11-19) In further violation of its own policy, Employer then terminated Lippincott solely because he entered the PTI program.

Faced with the lack of any evidence or testimony verifying that an investigation was actually conducted and, if so, the findings thereof, the ALC nonetheless improperly and automatically placed the Appellant into the category which imposed sanctions as though Lippincott's offense was work related. In so doing, the ALC deprived Lippincott of due process. Because no one testified concerning such a finding, there was no opportunity for Lippincott to cross examine witnesses testifying against him.

To disqualify Lippincott for benefits, there must have been a showing of all of the following: 1) the Employer undertook an investigation; 2) the Employer found that the offense was work related; and 3) the finding that the offense was work related was reasonable. On all of these points, Lippincott could have questioned the Employer at his hearing. This he could not do because the Employer elected not to appear. Instead, all of these points were presumed in favor of the non-appearing employer and against the appearing claimant.

The ALC compounded this deprivation of procedural due process by relying on conclusory material not admitted into the record in this matter to find that Lippincott was discharged for cause. The Order of the ALC states: "[a]s to the evidentiary support for Wal-Mart's application of its arrest and convictions policy, the Appellant's exit interview states that "Associate violated associate arrest and convictions policy." (R. p. 4 - 5) Even if Employer had appeared and made such a statement, that would have been the starting point of proof and analysis, not the end. By grounding its decision on this *ex parte* document

submitted by Employer but never entered into evidence, Lippincott was deprived of his due process rights to review the document, object to the document, cross examine the drafter of the document or even present testimony to rebut the document.

Due process is required even in administrative proceedings. “A fair trial in a fair tribunal is a basic requirement of due process, (and) this applies to administrative agencies which adjudicate as well as to courts.” *Garris v. Governing Board of S.C. Reinsurance Facility*, 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998) The Constitution of South Carolina, in Article I, Section 22, specifically grants due process in administrative hearings. By using documents never admitted into the record, the ALC violated Lippincott’s procedural due process rights and violated *S.C. Code Ann. §1-23-360* which specifically prohibits *ex parte* communications by adjudicators. The document, which was included in the file but never provided to Lippincott, was *ex parte*. Further, S.C. Appellate Rule 210(c) prohibits this document from even being included in the record on appeal because it was never presented at the hearing. It is clear from the Order of the ALC that this document was relied upon as substantial evidence in affirming the denial of benefits to Lippincott. Thus, unlike Dr. Ross in *Ross v. M.U.S.C.*, 328, S.C. 51, 492 S.E.2d 62 (1997) who failed to show prejudice to him by the *ex parte* communications, the prejudice to Lippincott is evident as the *ex parte* document was set out by the ALC as the basis for the finding of discharge for cause and its further speculation that because the policy was cited, it must have been properly applied and followed. This approach not only improperly shifted the burden of proof, it deprived Lippincott of his right to confront and cross examine Employer. Because Employer did not appear at the hearing, Lippincott could not cross examine the Employer regarding the

application of its policy and whether the Employer failed to properly apply same. The Employer did not present any evidence either as to the facts or its interpretation of its policy. This was all done by the ALC acting on the basis of a conclusory statement outside the record and its own unsupported speculation. The use of the *ex parte* document and the Administrative Law Court's interpretation thereof deprived Lippincott of the fair and impartial hearing to which he was entitled.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN SHIFTING THE BURDEN OF PROOF TO THE APPELLANT ON THE ISSUE OF WHETHER HE WAS DISCHARGED FOR CAUSE UNDER THE STATUTE.

The ALC effectively shifted the burden of proof to Lippincott when he required him to prove he was not discharged for cause under the statute. *S.C. Code § 41-35-120(2)(a)* states that a claimant may be partially or fully disqualified from unemployment benefits if discharged "for cause connected with his most recent work." This subsection of the statute defines the concept of "cause" as:

A charge of discharge for cause connected with the employment may not be made for failure to meet production requirements unless the failure is occasioned by willful failure or neglect of duty. "Cause connected with the employment" as used in this item requires more than a failure in good performance of the employee as the result of inability or incapacity. *Id.*

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Where the terms of the relevant statute are clear, there is no room for construction. *Parsons v. Georgetown Steel*, 318 S.C. 63, 65 (1995) (citing *State ex rel. McLeod v. Mills*, 256 S.C. 21, 180 S.E.2d 638 (1971)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be

reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The determination of legislative intent is a matter of law. *Georgia-Carolina Bail Bonds, Inc v. County of Aiken*, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003). The plain language of the statute as well as fundamental principles of statutory interpretation and relevant case law all establish that the discharge for cause exception was surely never intended to apply to conduct of the employee that has no connection to his employment, as in the present case.

The evidence here indicates that Employer never considered whether the arrest was related to work prior to discharging Lippincott. After Employer learned Lippincott was participating in PTI, he was immediately suspended and then discharged; being told that discharge is required whenever an employee enters a PTI program. (R. p. 40, lines 21-22) Employer presented no testimony or evidence regarding whether the conduct of Lippincott (which occurred in another county while he was on vacation) was connected to work. Lippincott testified that the arrest was not work related. There was no testimony or other evidence that the Employer ever investigated the charge or made any determination as to whether the charge was related to work.

In the face of Employer's failure to present any evidence whatsoever in this case, the ALC ruling improperly shifts the burden of proof and presumes that all claimants are guilty of being terminated for cause unless they prove their innocence. (R. p. 9) The ALC opinion is predicated on a misunderstanding of a claimant's initial burden to show eligibility and an employer's subsequent burden to prove a disqualification. The ALC justified its approach on the basis of its reading of *Hyman v. S. Carolina Employment Sec. Comm'n*, 234 S.C. 369,

373 S.E.2d 554 (1959). This case, however, does not stand for shifting the burden of proof that a claimant is discharged for cause in unemployment hearings to the claimant. *Hyman* sets forth only that a claimant seeking unemployment benefits must prove that he is ready, willing and able to work. The case cites a Virginia Supreme Court of Appeals which states, “the burden is on the claimant to show that he has met the benefit eligibility conditions, which in this case is unrestricted availability for work.” *Unemployment Compensation Comm’n v. Tomko*, 192 Va. 463, 64 S.E.2d 524, 527, 25 A.L.R.2d 1071. (cited in *Hyman* at 373)

The distinction between a claimant’s burden to show initial eligibility by being available for work and an employer’s burden to show discharge for cause connected to work is set out in the progeny of *Tomko*, as held in *Dan River Mills, Inc. v. Unemployment Compensation Commission*, 195 Va. 997, 81 S.E.2d 620 (1954), which stated “(t)he contention of the appellant-employer confuses the conditions for eligibility for benefits under section 60-46 with the grounds for disqualification for benefits under section 60-47. ... A claimant must be eligible for benefits before his disqualification need be inquired into.” *Id.* 1001, 622. Requiring a claimant to not only prove eligibility for benefits (ready, willing and able to work) but to also prove he should not be disqualified, imposes an unreasonable burden and an unfair presumption against a claimant. Such a burden was not intended by the legislature.

While South Carolina does not have case law specifically addressing this issue, it is readily apparent from our courts’ analysis in these cases that employer bear the burden of proving a disqualification. In *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991),

the Court looked at the employer's policy on confidentiality and whether the employee breached that policy in attending a press conference and then refusing to sign a document requested by the employer. The court noted that "[the employer] produced no evidence" that the employee engaged in any conduct that could reasonably be deemed to have violated the policy. (*Id.* at 129) Other jurisdictions similarly place the burden on the employer to prove a violation of policy sufficient to support a disqualification. The Georgia Court of Appeals held in *Barron v. Poythress*, 219 Ga. App. 775, 466 S.E.2d 665 (Ct. App. 1996) that the employer failed to carry its burden of proof in showing the former employee should be chargeable as at fault and disqualified from unemployment benefits. As in the present case, there was no evidence to support the conclusion of termination for cause and the employer "did not carry its burden of showing that Barron came within the disqualification exception." *Id.* at 777.

Likewise, in *Lewis v. FL UAC, et al.*, 710 So. 2d 1013, 1014 (Fla. 2d DCA 1998) where the issue was whether the employee quit or was fired, the court reversed a lower tribunal which had found that Ms. Lewis failed to carry her burden of proof in showing that she voluntarily quit for good cause. *Id.* at 1014. The Court rejected this burden shifting and explained that in an unemployment benefits case, the employee has the initial burden to prove she is eligible for unemployment which means that the employee "does not need to prove that she was fired, but only that she is 'unemployed'." *Id.* at 1014. In the case of discharge, however, "it is well settled that the employer has the burden to present evidence showing that the employee was discharged for misconduct." *Id.* at 1014. On appeal after remand, the court again reversed a denial of claimant's benefits because there was no

testimony or evidence presented by the employer, and, therefore, the employer failed to meet its burden of proof. The Court found that in the record of this case, "the appeals referee had nothing before her indicating that Lewis was discharged for misconduct, until she elicited Lewis's testimony on the subject." *Id.* at 1015. The Court found that the "record in this case clearly establishes that the appeals referee erred by placing the burden on Lewis to prove that she was not discharged for misconduct." *Id.* at 1015

Similarly, the ALC erred here by improperly shifting the burden of proof to Lippincott and ruling against him notwithstanding the lack of any evidence presented by the employer. Employer in this matter did not attend the hearing, did not present any testimony, and did not offer any evidence at this hearing. There is no evidence or testimony which supports a finding that the conduct of Lippincott was work related or that he committed any other acts which would justify his disqualification from benefits. In fact, the record supports a finding of the opposite--Lippincott's conduct was not work related and he should be awarded benefits. The Employer elected to abandon its case and by so doing did not carry its burden of proof. Therefore, the Administrative Law Court has erred in improperly shifting this burden to Lippincott. The denial of benefits should be reversed accordingly.

III. ADMINISTRATIVE LAW COURT ERRED IN HOLDING AS A MATTER OF LAW THAT APPELLANT WAS DISCHARGED FOR CAUSE CONNECTED WITH HIS EMPLOYMENT FOR ENTERING A PRE-TRIAL INTERVENTION PROGRAM FOR OFF-DUTY, OFF-SITE CONDUCT.

S.C. Code §41-35-120(2)(a) is clear and unambiguous. This statute provides for disqualification from unemployment benefits upon a finding that the employee has been discharged for cause connected with his most recent work. The conduct must be connected

to work. That connection never existed in this case. In fact, the Administrative Hearing Officer found that Lippincott was discharged because he entered a deferred prosecution program in violation of the Employer's policy. (R. p. 22) While an employer may discharge an employee for violating its policy, for the purposes of eligibility for unemployment benefits, the policy must be consistent with the eligibility provisions of the law.

Entry into a PTI program, in itself, is not evidence of guilt. To the contrary, courts that have addressed this very issue have provided clear instruction on its applicability. In *Unemployment Compensation Board of Review v. Vereen*, 29 Pa. Commw. 252, 370 A.2d 1228 (1977), the claimant was arrested for theft from his employer and entered an Accelerated Rehabilitative Disposition (ARD) program. The Court stated that "the ARD program does not at any point determine guilt or culminate in a criminal conviction. Participation in the ARD program leads, if the program is completed satisfactorily, to the dismissal of the charges." (*Id.* at 256) The Court found that presenting claimant's admission to an ARD program was not sufficient proof of any wrongdoing incompatible with work responsibilities, and so the employer failed to carry its burden of proof. (*Id.* at 257) Thus, the fact that Lippincott entered a PTI program is not evidence of any wrongdoing; however, Employer's policy equates it with a guilty plea and disregards whether there is any connect between the arrest and Lippincott's work.

In *Gillins v. Commonwealth of Pennsylvania*, 534 Pa. 590, 633 A.2d 1150 (1993), the Supreme Court of Pennsylvania reversed a denial of unemployment benefits based on the employee's mere arrest as a violation of the company's policy. In this case, two separate appeals were consolidated to address the issue of whether an employee should be disqualified

for unemployment benefits based solely on the fact of an off-duty arrest without proof of the underlying charges. (*Id.* at 1152) The Court established the following:

the employer has the burden of proving: (1) that the conduct of the claimant leading to the criminal arrest was inconsistent with acceptable standards of behavior, and (2) that the claimant's conduct directly reflects upon his ability to perform his assigned duties. Moreover, both prongs of the test must be satisfied for the employer to meet its burden of proof that a claimant is unemployed through fault of his own. *Id.* at 597, 1154

Thus, the Court is requiring a nexus between the conduct of the employee and the work of the employer. In the instant case, Employer wholly failed to carry its burden of proof.

IV. THE ADMINISTRATIVE LAW COURT ERRED, AS A MATTER OF LAW, IN FAILING TO ASSESS WHETHER ITS INTERPRETATION AND APPLICATION OF THE EMPLOYER'S POLICY WHICH ELIMINATED THE CONNECTED TO EMPLOYMENT REQUIREMENT AND THE NEED FOR NOTICE TO THE EMPLOYEE WAS REASONABLE UNDER THE STATUTE.

South Carolina allows for a violation of an employer's policy to serve as grounds for discharge for cause sufficient to support a disqualification from unemployment benefits only where the employer's policy is reasonable, both as written and as applied to particular facts and circumstances. *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991) There was no evidence that Employer actually interpreted and applied its policy to determine whether the conduct underlying Lippincott's arrest was work related. Even if it is determined that the Administrative Hearing Officer was within her discretion to interpret the policy as she saw fit, without any supporting evidence and in a manner directly contrary to the plain language of the policy, she failed to properly evaluate whether the policy (as interpreted and applied by her) was reasonable so as to support a disqualification from unemployment benefits.

The evidence and testimony presented at the hearing show that Lippincott was terminated based solely upon his entrance into a PTI Program. (R. p. 31, line 21) There was no analysis of the charge for which he was arrested, or the underlying facts and circumstances concerning that charge and whether there was any connection to work. Based on the evidence, the only relevant fact to Employer was Lippincott's entry into a PTI program. Therefore, the policy could not serve as the basis of a termination for cause unless it is interpreted to provide for discharge no matter what the criminal charge and underlying circumstances re, regardless of whether they are work related and even if the charges are dismissed pursuant to a PTI program. Under the case law in this state, this approach is unreasonable for purposes of disqualifying a worker from unemployment benefits.

While an employer is free to set any policy for discharge that it chooses, that policy (if it is unreasonable) cannot be grounds for disqualification from the public benefit of unemployment compensation. In *Mickens*, the Court looked at the employer's policy on confidentiality and whether the employee breached that policy in attending a press conference and then refusing to sign a document requested by the employer. The Court considered what conduct the employer could rightfully expect from an employee and stressed that what is reasonable "will vary according to the circumstances of each case" (*Id.* at 130 citing *Sandstrom v. Douglas Machine Corp.*, 372 N.W.2d 89 (Minn. App. 1985); *Simpson v. Commonwealth Unemployment Compensation Board*, 69 Pa. Commw. 120, 450 A.2d 305 (PA 1982) and that the Court will assess "the reasonableness of the employer's request... (and) the employee's reason for non-compliance." (*Mickens* at 130) The court went on to hold that the employer's application of its policy under the particular facts at issue was

not reasonable so as to disqualify the claimant from unemployment benefits. (*Id.* at 131)

The policy, as interpreted and applied by the ALC, would disqualify any employee who entered a PTI program, no matter what the underlying charge and without regard to its relationship to the employment from unemployment benefits. In addition to violating the requirement that a discharge be based on facts demonstrating conduct connected with employment, allowing this type of broad penalty would effectively gut our state's PTI program. The PTI program was put in place to streamline our criminal justice system and allow first time arrestees to continue to be productive members of society. The PTI program is specifically designed to minimize the impact on the person's employment which is hoped to be maintained to prevent them from falling onto the public rolls and be more vulnerable to the temptations of criminal activity. A policy that mandates discharge for any employee entering a PTI program, without regard to the underlying facts of the arrest, is unreasonable, contrary to law and contrary to the public interests.

The Administrative Hearing Officer specifically found that by entering a PTI program, Lippincott "acted in a manner which he knew or reasonably should have known, would jeopardize his employment." (R. p. 22) This finding of knowing violation by entering a PTI is also not supported by any evidence and directly contradicted by the testimony presented at the hearing. (R. p. 35, lines 20 - 22, p. 36, lines 1 - 6) Implied in the reasonable requirement is proper notice of the policy. That has not been established in this case. Lippincott had no prior notice that entry into a PTI program would cost him his job. Had he been provided with notice of the consequences of entering a PTI program, he may not have chosen that program. The Tennessee Supreme Court dealt with the issue of policy violation

and criminal charges in the unemployment context in *Hale v. Neeley*, 335 S.W.3d 599, (Tenn. Ct. App. Nov. 19, 2010) In *Hale*, a claimant had violated his employer's policy by being convicted of misdemeanor possession of cocaine. The Court in *Hale* held that "an employee's off-duty drug use (or even an off-duty arrest for drug possession) is not necessarily a breach of duty to the employer, even if the employer has a policy prohibiting the use of drugs on or off-duty." *Id.* at 602. The Court went on to state that had the conviction been Mr. Hale's only issue, "Mr. Hale would have been guilty of violating a duty owed to society in general" and not be disqualified from benefits. *Id.* at 603. The Court in *Hale* ruled against the claimant on the basis that he violated a known written policy he, himself, had signed requiring him to report his conviction to his employer within three days. *Id.* at 603. Here Lippincott did not have knowledge of the policy at issue and was not notified that he would be discharged if he entered a PTI program until his actual discharge by Employer. (R. p.36, lines 3 – 9, and lines 19 – 21). Thus, there is no evidence that Lippincott knowingly violated any policy. Moreover, contrary to the presumption of guilt of the underlying charge that runs through the ALC decision, Lippincott never admitted to and was never convicted of a criminal act.

The ALC ignored the failure of Employer to apply its policy, stating that even if Employer failed to follow its own policies, "whether the employer properly applied the policy is not conclusive as to whether the employee failed to meet the standard of behavior the employer can expect." (R. p. 5) This allegation for disqualification was never raised by Employer as the reason for discharge. Further, simply equating any off duty arrest as a violation of the employer's reasonable standards and basis for disqualification has been

rejected by the courts. See *Zang v. Davenport*, No. 01A01-9501-CH00024, 1995 Tenn. App. LEXIS 355, 1995 WL 322628 (holding employer failed to meet its burden to show disqualification based on an off duty drug use and citing case that “speculation” that drug use “potentially may have on the job effects” was insufficient to show requisite work connection.); *Dura Automotive Systems, Inc. v. Neeley*, No. M2009-00908-COA-R3-CV, 2010 Tenn. App. LEXIS 44 (holding that considering all facts and circumstances isolated instance of admitted off duty drug use, while it may have been a basis for discharge, was not grounds for disqualifying claimant from unemployment benefits because not work related misconduct.) These cases look to whether the employee’s wrongdoing violates a duty owed to the employer, without finding such, it cannot be misconduct connected to work. (*Id.* at 9 citing *Weaver v. Wallace*, 565 S.W.2d 867, 870 [Tenn. 1978]).

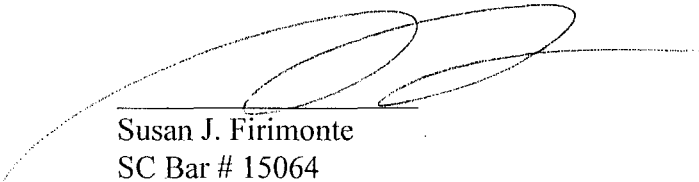
CONCLUSION

For the reasons stated above, Lippincott is entitled to a reversal of the Order of the Administrative Law Court and a finding that he is entitled unemployment benefits without disqualification.

Respectfully submitted,

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In the Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0343-AP
App. Ct. Case # 2011203268

William Lippincott,

Appellant

v.

South Carolina Department of
Employment and Workforce and
Wal-Mart Assoc., Inc.,

Respondents

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ISSUES ON APPEAL

- I. IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION OF THE SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE APPELLATE PANEL, WHICH HELD THE APPELLANT DISQUALIFIED FROM RECEIVING BENEFITS, UPON FINDING THAT THE CLAIMANT WAS DISCHARGED FOR CAUSE CONNECTED WITH HER EMPLOYMENT?
- II. DID THE ADMINISTRATIVE LAW COURT DEPRIVE THE APPELLANT OF PROCEDURAL DUE PROCESS?
- III. DID THE ADMINISTRATIVE LAW COURT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE APPELLANT?
- IV. DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE DEPARTMENT'S FINDING THAT THE APPELLANT WAS DISCHARGED FOR CAUSE CONNECTED WITH WORK?
- V. DID THE ADMINISTRATIVE LAW COURT PROPERLY RULE ON THE DEPARTMENT'S ASSESSMENT OF THE REASONABLENESS OF THE EMPLOYER'S POLICY?

STATEMENT OF THE CASE

William E. Lippincott, (hereafter "Appellant") worked for Wal-Mart Associates, Inc., (hereafter "Employer") from May 11, 1992, to January 31, 2011. (R.51, R. 31, L.12-14). On February 4, 2011, the Appellant filed a claim for unemployment benefits with the South Carolina Department of Employment and Workforce (hereafter "SCDEW" or "Department"). (R.48). Facts were gathered from the Appellant and Employer. (R.48-60). A SCDEW claims adjudicator imposed a 14 week disqualification from benefits upon the Appellant, finding that he was discharged from his employment for violation of company policy (R.26).

The Appellant appealed the adjudicator's determination to the SCDEW Appeal Tribunal. (R.24-25). Sworn testimony and evidence was presented to the Tribunal. (R.27-47). The Tribunal concluded that the Appellant was discharged for cause connected with work.

The benefit disqualification was reduced. (R.21-22). Next, the Appellant appealed to the Department's Appellate Panel. (R.46-48). In its Decision No. 2011-P-1346, mailed June 17, 2011, the Panel found that the Appellant was discharged for cause and adjusted the Appellant's disqualification from benefits to fourteen (14) weeks. (R.14-16). The Department's decision was affirmed by the Administrative Law Court (hereinafter "ALC") in its Order entered October 18, 2011 in case 11-ALJ-22-0343-AP. It is this ALC order that is before this court for review.

FACTS

William E. Lippincott, worked for Wal-Mart Associates, Inc., from May 11, 1992, to January 31, 2011, most recently as a sales associate. (R.51, R.5, L.12-14). The record shows that the Appellant was made aware of the employer's policies at various times throughout his employment, including but not limited to, at orientation (R.56), reassignments, and during Coachings for Improvement, e.g. (R.47,48). The Appellant denied that he was aware of employment policies. (R.36, L.19-21--R.37, L.1-3). The Employer's evidence of attendance for the 2010 calendar year documents multiple attendance violations, including, unapproved absences, tardiness, leaving work early, and incomplete shifts. (R.53-55). The Appellant was on a disciplinary warning from September 22, 2009, through September 23, 2010. (R.58). The Employer has both an employee policy regarding Associate Arrests and Convictions and a Management Guide for implementation of the policy. (R.59-60, 46-47).

On or about July 12, 2010, while already on a disciplinary warning, the Appellant was arrested and criminally charged with accessory to a theft. (R.32, L.16-18, R.33, L.4-6, 18-19). The Appellant did not immediately notify his Employer of the arrest. (R.32, L.13-15). Shortly thereafter, the Appellant admitted to his employer that he had a drug problem. (R.34, L.5-7). In September 2010, when he went to Court for the July 2010, arrest, the Appellant

applied for a Pre-Trial Intervention (PTI) Program. (R.43, L.3-6). In January 2011, the Appellant entered PTI, so that he wouldn't risk going to jail. (R.35, L.7, R.39, L7-8, R.43, L5-7). It was only after the Appellant entered into PTI in January 2011, he first notified his employer about his arrest and the required attendance at PTI. He was suspended for three weeks after which the Appellant was terminated for violation of company policy. (R.35, L.15-19).

ARGUMENT

Standard of Review

“Section 1-23-610 of the South Carolina Code (Supp. 2006) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an Appeal from an administrative agency. ‘The review of the administrative law judge’s order must be confined to the record.’ *Id.* The court of appeals may reverse or modify the decision only if substantive rights of the appellant [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion or affected by other error of law. *Id.*”

South Carolina Department of Corrections v. Mitchell, 377 S.C. 256, 659 S.E.2d 233 (S.C. App. 2008).

The SCDEW¹ is an “agency” within the meaning of the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 218, S.E.2d 365, 367 (1984). This court reviews decisions of the SCDEW Appellate Panel pursuant to the judicial review provisions of the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-380 and 1-23-600 (2010). *See Gibson*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984); *McEachern v. S.C. Employment Sec. Comm’n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-647 (Ct. App. 2006).

“The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence of questions of fact. The court may affirm the

¹ The South Carolina Department of Employment and Workforce was formerly known as the Employment Security Commission. 2010 S.C. Act. No. 146.

decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision 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, probable and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

Under the deferential standards established by those provisions, “[t]he findings of an agency are presumed correct and will be set aside only if unsupported by substantial evidence” *Kearse v. State Health and Human Services Finance Commission*, 318 S.C. 198, 456 S.E.2d 892, 893 (1995). The burden is on the party seeking to overturn an agency decision “to prove convincingly that the agency’s decision is unsupported by the evidence.” *Waters v. South Carolina Land Resources Commission*, 321 S.C. 219, 467 S.E.2d 913, 917 (1996).

“Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Glenn v. South Carolina Dep’t of Mental Health*, 291 S.C. 279, 353 S.E.2d 284, 286 (1987). The testimony of a single witness, where credited by the administrative agency, constitutes substantial evidence sufficient to support a factual finding “unless there is no reasonable probability that the fact could be as related by the witness.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304, 307 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s finding. *Id.*

“Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.” *Merck v. South Carolina Employment Security Commission, et al.*, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (S.C. 1986), citing *Gibson*, *supra*.

In contrast to factual findings, statutory interpretation is a matter of law and, as such, subject to *de novo* review by the Court. See *Transportation Inc. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 287, 289 (2010). Nevertheless, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *Id.* (internal citations omitted).

Law / Analysis

I. The decision of the South Carolina Department of Employment and Workforce is supported by substantial evidence in the record.

The Administrative Law Court properly affirmed the Department’s decision. SCDEW Appellate Panel affirmed the Appellant’s partial disqualification from receiving unemployment benefits upon finding that he was discharged from his employment for cause, to-wit: violation(s) of Employer policies and procedures. In accordance with the standard of review, heretofore prescribed, the Department’s decision must be affirmed because it is supported by substantial evidence and accords with applicable statutory and case law.

An individual may be totally or partially ineligible for unemployment benefits if the Agency “finds that he has been discharged for cause connected with his most recent work”. S.C. Code Ann. § 41-35-120 (2).

The term “misconduct”² has been defined to include:

(1) the wanton and willful disregard of the employer’s interests; (2) the deliberate violation of rules; (3) the disregard of the standard of behavior which an employer can rightfully expect from an employee; or (4) intentional and substantial negligent disregard for the employee’s interests, duties or obligations.

Lee v. South Carolina Employment Security Commission, 277 S.C. 586, 291 S.E.2d 378, 379. (S.C. 1982). A discharge for cause is justified when an employee disregards the standard of behavior that an employer can rightfully expect from the employer. *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991).

The Appellant argues that his criminal conduct of being involved in a theft – a crime of dishonesty - was not connected with his employment or job-related, because his criminal acts occurred while the Appellant was on vacation. Also, the Appellant argues that the SCDEW Panel did not have substantial evidence to support its finding that the Appellant was discharged for cause. These arguments are baseless. Considering the record as a whole, the Panel’s conclusions are supported by substantial evidence, fact, and law.

Uncontroverted facts in the record include:

1) In 2010, the Appellant was a sales associate for Wal-Mart in Florence County, S.C.;

2) The Appellant worked while on a disciplinary term from September 22, 2009, through September 23, 2010. (R.15)

3) While on vacation in July 2010, the Appellant was arrested and criminally charged with Accessory to Theft;

4) Although he did not inform employer of the pending criminal charge until January 2011, some six months after his arrest; in July or August 2010, the Appellant admitted to his employer that he, the Appellant, had a drug problem and needed help; (R.30, L.5-7);

5) In September 2010, the Appellant applied for Pre-trial Intervention, in order to avoid jail time for the July 2010, criminal charge. The Appellant still had not yet informed his employer about the pending theft charges;

² The term “cause” was substituted for “misconduct” by 1985 S.C. Act No.154, §6. The terms are synonymous.

6) The Appellant was accepted into the PTI program in January 2011, and at long last informed his Employer of his involvement in a crime of dishonesty;

7) The Employer immediately suspended the Appellant so it could conduct its investigation into the matter, pursuant to its policy;

8) Three weeks later the Appellant was terminated upon the Employer's finding that the Appellant's conduct was a gross misconduct.

In a similar case, *Hale v. Neeley, et al.*, 335 S.W.3d 599 (Tenn. Ct. App. 2011), the Tennessee Court of Appeals upheld a decision that denied a Wal-Mart employee unemployment benefits. In that case the employee was arrested for possession of a controlled substance while he was on vacation and not on duty or on the employer's premises. He informed the Employer about his arraignment, and was suspended from work pending trial. Ten days after he pled guilty to a misdemeanor, the employee informed Wal-Mart of his conviction. He was terminated for gross misconduct and violation of policy.

As in this case, the employee argued that that it was error for him to be denied unemployment benefits upon a finding of misconduct connected with his work. The Court explained that:

"it is not necessary that the act of misconduct occur during the working hours or at the place of employment so long as it is connected with the employment, and the fact that misconduct related to the private life or off-duty activities of the employee does not necessarily preclude its having a connection with the employment requisite to bar the right to compensation."

Id., 335 S.W.3d 599, 602, citing *Weaver v. Wallace*, 565 S.W.2d 867, 870 (Tenn.1978).

Ultimately the court did not rule on whether the drug conviction in the Hale case was "connected with employment"; rather, it upheld the disqualification of benefits upon Hale's violation of Wal-Mart policies, including the policy dealing with associates who are arrested.

The case at bar is distinguished factually from *Hale* in that: (a) the Appellant's misconduct involves a crime of dishonesty rather than substance abuse; and (b) unlike *Hale*,

the Appellant was on a disciplinary warning at the time of his arrest. It is not distinguishable on the basis of employer policy and South Carolina unemployment law.

The preamble of the Wal-Mart's Associate Arrests and Convictions Policy (R.16-17) sets forth the company tenet that "our associates should be honest and law-abiding individuals." (emphasis added). This clearly establishes the Employer's interests and the standard of behavior expected from Associates. The policy goes on to explain, in pertinent part:

A. that there will be a review to determine whether or not the charges are job related;

B. if it is determined that the alleged conduct for which the associate was arrested indicates that the associate is unfit for job, the associate will be suspended, pending the outcome of the charges; and

C. if you [Associate] are found guilty, plead guilty, plead no contest, or are allowed to participate in a deferred prosecution program we will terminate your employment. (emphasis added).

The Appellant's / Claimant's Exhibit #2 (R.42-43) are the Management Guidelines for the Associate Arrests and Convictions Policy. Relevant portions require a review of the charges to determine if the alleged conduct is job related (i.e. does the conduct indicate that the associate is unfit to continue working in his/her position). Examples include, but are not limited to arrests for theft...." The Management Guide reiterates that associates who are found guilty, plead guilty, plead no contest, or are allowed to participate in a deferred prosecution program will be terminated from employment.

There is no doubt that Pre-Trial Intervention is a deferred prosecution program. Successful completion by an offender results in a noncriminal disposition of the charge(s). S.C. Code Ann. § 17-22-150. However, prosecution of pending criminal charges against the offender is resumed upon violation of the PTI agreement. According to the Wal-Mart policy

entry into such program results in termination of employment, thus termination was warranted.

Wal-Mart is a retail establishment. The Appellant is a sales associate. The Appellant knew or should have known that the standard of behavior expected by the Employer included honesty and lawfulness. The Appellant's participation in a crime of dishonesty demonstrates, at minimum, the wanton and willful disregard for his employer's interests; the disregard of the standard of behavior which an employer can rightfully expect from an employee; and an intentional or substantial negligent disregard for the employee's interests, duties or obligations.

"Black's Law Dictionary, rev'd 4th ed., defines "dishonesty" as "[d]isposition to lie, cheat, or defraud; untrustworthiness; lack of integrity." In State v. Al-Amin, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct.App. 2003), the State Court of Appeals defined "dishonesty" as "'disposition to lie, cheat, or steal.'" United States v. Papia, 560 F.2d 827, 845 (7th Cir.1977) (citing Random House College Dictionary 380 (abr. ed.1973))...; see also Webster's New Twentieth Century Dictionary 525 (2d ed.1983) (defining "dishonesty" as "deceiving, stealing, etc.")..."To be dishonest means to deceive, defraud or steal." State v. Saldano, 36 Wash. App. 344, 675 P.2d 1231, 1236 (1984) (citing Oxford English Dictionary (1969))...See also Gregory v. State, 616 A.2d 1198, 1204 (De1.1992) (defining the term "dishonesty" as "the act or practice of lying, deceiving, cheating, stealing or defrauding.")..."In common human experience[,] acts of deceit, fraud, cheating, or stealing ... are universally regarded as conduct which reflects adversely on a man's honesty and integrity." Bogard v. State, 624 So.2d 1313, 1317 (Miss.1993)."

08-250 S.C.A.G. 2008.

The dishonest nature of the crime reflects negatively upon the Appellant's character and brings into question his fitness to work as a sales associate, much like the use of a theft conviction for impeachment purposes pursuant to Rule 609(a) (2), SCRE. It is evidence of the Appellant's lack of integrity, honesty, trustworthiness, judgment, veracity, truthfulness, and credibility.

The Employer's expectation of honest and law abiding employees is reasonable. It is reasonable for an employer to determine that the risk of knowingly employing an individual who has exhibited dishonest, untrustworthy propensities is great. Such an act would expose the employer to unnecessary liability for intentionally allowing an opportunity for further acts misconduct. As the Panel correctly expressed, "The connection to the work is the [dishonest] nature of the crime itself." Inasmuch as the nexus between the Appellant's criminal misconduct and his employment has been established by substantial evidence, the SCDEW finding that the Appellant was terminated for cause must be affirmed.

An employer need not turn a blind eye to an employee's overall conduct, good or bad, in a decision to discharge an employee. In this case, it cannot be forgotten that the Employer's decision to terminate the Appellant was made with knowledge that the Appellant:

- * was on an Employer disciplinary status at the time the criminal offense occurred;
- * was not forthright or timely in informing the Employer of the arrest (he waited until after the disciplinary period expired);
- * had admitted his substance abuse problem to his employer in September 2010; and
- * had multiple attendance violations in 2010.

II. The Appellant was not denied Due Process.

The Appellant asserts the ALC, and thus the Agency, erred in its consideration of information submitted by the employer to the Department during the initial fact finding. This is not true. The legislature requires the Tribunal to consider all material Agency records. 3 S.C. Code Ann Regs. 47-51 (C) (2011).

Procedurally, when a claimant files for unemployment benefits, both the claimant and the employer are allowed to provide information relevant to the separation. It is this information upon which a claim adjudicator makes an initial determination of qualification

for benefits. Obviously, this information becomes material evidence in the Agency's record. Records of the Agency are available to a claimant or his representative pursuant to 3 S.C. Code Ann. Regs. 47-54 (2011). The claimant or his representative could have requested that a subpoena issue for any employer witnesses that he felt were necessary, pursuant to 3 S.C. Code Ann. Regs. 47-53 (2011). In this case, the Appellant requested neither Agency records nor Subpoena in preparation for his case.

The Appellant argues, too, that Employer's initial documentary information is inadmissible hearsay. This argument fails on many levels. In addition to the several exceptions to the hearsay rule that apply, the Appellant never raised a hearsay objection to the Department; therefore, it is untimely and has been waived.

Finally, as the ALC points out, the Appellant's own admissions and statements corroborate the Employer's documentation. The only issue in controversy was whether or not the Appellant was aware of the Employer's policy. The Administrative Law Court addressed this issue, to-wit:

"The Appellant notes in his brief that he testified during the evidentiary hearing that he did not receive the arrest and convictions policy. The Court does not view this as fatal. If an employer needed to outline every single circumstance that could possibly violate the standard of behavior rightfully expected, claims of termination without cause even in cases of egregious employee conduct would render the unemployment benefit process susceptible to abuse and contravene the purpose of South Carolina's unemployment law. See. S.C. Code Ann. § 41-27-20. ... 'An employer is not required to prove the existence of a reasonable rule or policy by direct evidence, but the court may reach that determination by a common-sense realization that certain conduct intentionally and substantially disregards an employer's interest.' 76 Am. Jur. 2d Unemployment Compensation § 72. ... **The common sense determination in this case is that a retailer does not want people in its employ who have a history of helping others attempt to steal.**" (emphasis added).

Order, S.C. Adm. Law Ct., No. 11-ALJ-22-0343, P.8.

Another alleged due process violation asserted by the Appellant is that there is no evidence that the Employer investigated the Appellant's situation before imposing a separation. There is no evidence one way or another about this; however, it is clear that the Appellant was given a suspension. Common sense is that during this time, the employer did due diligence, investigated, and considered sanctions based on a totality of information available to it, not only about the criminal conduct, but also the admitted drug addiction, attendance issues, and misconduct write-ups. Still, the Appellant argues, without authority, that to be disqualified from benefits, the employer had to undertake an investigation and find the offense was work related. This is not true. Conditions of eligibility for benefits is set forth in S.C. Code Ann. § 41-35-110 (2010), and disqualification provisions are set forth in S.C. Code Ann. § 41-35-120 (2010).

The Appellant's assertion of due process violations is without merit or support.

III. There was no erroneous shifting of the burden of proof.

Before the Administrative Law Court, the burden is on the party seeking to overturn an agency decision "to prove convincingly that the agency's decision is unsupported by the evidence." *Waters*, supra.

The ALC notes, "Where a claimant files an application for unemployment benefits the burden is upon such claimant to show that he has met eligibility conditions." *Citing Hyman v. S. Carolina Employment Sec. Comm'n*, 234 S.C. 369, 373, 108 S.E.2d 554,556 (1959).

As to the burden of proof before the Agency, there was no shifting of the burden. When the Claimant filed for benefits he, himself, stated that he was discharged for gross misconduct³. Each claim triggers a request for separation information from the respective employer. In

³ While both the Appellant and the Employer described the Appellant's misconduct as "gross", the evidence did not support a finding of "gross misconduct" as defined in the statute.

this case, the Employer provided business records regarding the separation which corroborated the Appellant's information. The information provided by the Appellant, coupled with the Employer's information, was sufficient to support a disqualification upon finding of discharge for cause connected with employment.

In this case, as in many, the Appellant initiated the unemployment claims process by filing a claim for benefits (R.5). In order to determine the Appellant's eligibility, the Agency engaged in fact-finding, which included the gathering of documentary evidence and verbal interviews from both the claimant and the employer (R.7-18). It was during the fact-finding that the employer provided its policy regarding arrest and conviction, as well as other recent employment history for the Appellant. The Appellant's initial evidence included a statement that: "I was separated...because...I was enrolled in a Pre-Trial Intervention Program...." Based on the totality of the facts gathered and evidence at hand, the claims adjudicator determined the Appellant's discharge from employment was for cause and imposed a fifteen (15) week disqualification of benefits. (R.19).

As allowed pursuant to S.C. Code Ann.41-35-740, the Appellant appealed the initial determination of partial disqualification and a hearing before the SCDEW Appeal Tribunal was scheduled. He was afforded a hearing. The Appellant appeared with counsel and another witness. He was not compelled by the Tribunal to testify. He chose to testify. He voluntarily provided details of his involvement in and arrest for accessory to attempt theft. He voluntarily admitted to entering into a pre-trial intervention program. The burden was not shifted. The Appellant did not have to testify. His testimony included:

- a) an elaboration of his criminal acts that resulted in arrest and charge for accessory to attempted theft;
- b) his admission to his employer about substance abuse and a need for assistance;

c) his failure to notify his employer of the arrest for a crime of dishonesty, until six (6) months after the crime and only after he applied and had been accepted into PTI; and

d) a copy of the management guidelines for Wal-Mart's arrest and conviction policy [Claimant's (Appellant's) Exhibit #2 (R.42-43)].

The Appellant's own testimony and evidence corroborated the Employer's Evidence of discharge for cause and substantiated a disqualification from benefits. The end result is the shifting of the burden is a non-issue in this case. Based on the totality of the evidence and its review of the record, the Administrative Law Court correctly affirmed the Department's decision.

IV The Administrative Law Court did not err in affirming the Department decision to disqualify the Appellant from benefits upon finding that he was discharged for good cause connected with work.

The Appellant admitted that he was arrested and charged with accessory to attempt theft, which is a crime of dishonesty. The Appellant admitted that he entered in Pre-Trial Intervention. The Appellant admitted that he informed his employer about a substance abuse problem.

The Appellant argues that since the crime was committed while the Appellant was he was off-duty and off site, his act was not connected with work. There are many factors to be considered in gauging whether conduct is connected with work. *See, Milliken & Co., Pendleton Plant v. South Carolina Employment Sec. Comm'n*, 315 S.C. 492, 445 S.E.2d 640 (Ct. App.1994), *rev'd on other grounds*, 321 S.C. 349, 468 S.E.2d 638 (1996, *reh'g denied*, (Apr. 18, 1996). As cited in the ALC decision, there are cases in which wholly off-duty acts can constitute cause connected with employment. *O'Neal v. Employment Sec. Agency*, 89 Idaho 313, 404 P.2d 600 (1965); *Johnson v. Board of Comm'rs*, 348 So.2d 1289 (La.App 1977). In the case at bar the ALC's summary of the nexus is accurate and concise.

"The Appellant's admitted behavior of helping others attempt to steal threatens Wal-Mart's business interest. Wal-Mart has an interest in employing Sales Associates who refrain from helping others attempt to steal. The obvious nature of Wal-Mart as a retail store containing untold quantities of portable goods, coupled with the Appellant's exhibited willingness to engage in criminal behavior designed to wrongfully take and carry away of the goods of another against the owner's will or without his consent, shows that Wal-Mart discharged the Appellant for misconduct connected with his employment as a Sales Associate."

Order, S.C. Adm. Law Ct., No. 11-ALJ-22-0343, Pgs.7-8.

The Appellant's assertion that entry in PTI is insufficient, by itself, to constitute a discharge for misconduct. This has been discussed in Section I herein. *See, also, Hale, supra.*

V. The Administrative Law Court properly ruled on the Agency's interpretation and assessment of the reasonableness of the Employer's Policy.

The SCDEW Appellate Panel specifically find the Employer's policy reasonable (R.2). Citing *Merck, supra*, the ALC agreed that the Panel may make finding of fact and conclusions of law pursuant to S.C. Code Ann. § 41-35-710.

This was discussed a bit in Section I herein. The Employer has a right to protect its interests. It is reasonable for a retail employer to have a mission statement desiring its employees to be honest and law-abiding. Using a normal employer test, it is reasonable for an employer to create a policy in furtherance of these goals and expectations.

The employer has a reasonable interest in knowing whether or not an associate has been arrested. The policy requires termination if an associate does not report an arrest within three days after the arrest. In the case at bar, the Appellant did not advise his employer of the arrest until months after the arrest, - conduct which is an obvious, willful deception to his employer. The policy requires termination if an associate enters into a pre-trial intervention program. The underlying crime of dishonesty is in direct conflict with the employer's mission statement. Given the totality of the circumstances, to-wit: the accessory

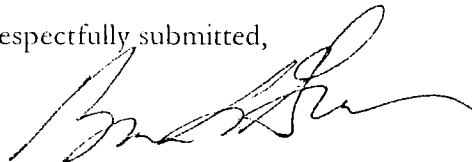
to attempt theft, attendance violations, substance abuse, and enrollment in PTI, in this at-will employment state, Wal-Mart would have had good cause to terminate the Appellant with or without the policy.

CONCLUSION

There are no errors of legal or factual matters by either the Administrative Law Court or the Department of Employment and Workforce that warrant an outcome other than affirmation of both decisions. The Appellant has the burden of proof before this Court and has not succeeded in meeting that burden.

The decision of the Department and Administrative Law Court is supported by substantial evidence, common sense, and sound legal basis. In absence of harmful error resulting in prejudice to the Appellant, the order of the Administrative Law Court must be affirmed.

Respectfully submitted,



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March 15, 2012
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0343-AP

William E. Lippincott,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Wal-Mart Associates,
Inc.,

Respondents.

APPELLANT'S FINAL REPLY BRIEF

March 1, 2012

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ARGUMENTS

- I. THE COURT BELOW ERRED AS A MATTER OF LAW IN HOLDING THAT A DISCHARGE FOR MERELY ENTERING AN AUTHORIZED PRETRIAL INTERVENTION PROGRAM UNDER S.C. CODE ANN. §17-22-10, ET SEQ. IS "JUST CAUSE" TO DISQUALIFY A WORKER FROM UNEMPLOYMENT COMPENSATION.
- II. THE DEPARTMENT ERRED IN MISSTATING THE EMPLOYER'S POLICY AND APPLYING SAID POLICY WITHOUT REGARD TO CONNECTION TO WORK IN VIOLATION OF S.C. CODE §41-35-120(2)(a).
- III. THE DEPARTMENT ERRED IN IMPROPERLY SHIFTING THE BURDEN OF PROOF, THEREBY PLACING AN IMPROPER BURDEN ON CLAIMANTS IN UNEMPLOYMENT COMPENSATION HEARINGS.

INTRODUCTION

Appellant, William Lippincott, was terminated from his position solely because he entered a pretrial intervention program after he was arrested while on vacation. Respondent's arguments equating participation in the program with guilt are invalid. Pursuant to S.C. Code Ann. §17-22-150, pretrial intervention is offered only to persons the government determines unlikely to commit crimes in the future and participation is intended to be without penalty to participants and to restore them to their prior position and to expunge any record of the underlying charge. Accordingly, mere entry into a pretrial intervention program under S.C. Code Ann. §17-22-10, et seq. cannot be the basis of a disqualification from unemployment benefits under S.C. Code Ann. §41-35-120(2)(a). Even if Respondent's arguments and the decision below did not contravene these statutes, Respondent's reliance on a mere arrest without any investigation of the

underlying circumstances cannot serve as the basis of a disqualifying discharge "for cause." Finally, in the face of the employer's refusal to participate in the evidentiary hearing below and therefore the absence of any evidence that it properly applied its policy, Respondent attempts to shift the burden of proof to the claimant to prove that he was not properly disqualified. Respondent's approach violates well-established case law and the Department's own rulings. Without any testimony or evidence that the Appellant's conduct was found to be connected to work, the Department cannot and should not, by implication alone, make such a finding. In sum, the decision below is predicated on errors of law and the record is devoid of any substantial evidence that appellant was terminated for misconduct within the contemplation of the statute. The disqualification from unemployment compensation should be reversed.

I. THE COURT BELOW ERRED AS A MATTER OF LAW IN HOLDING THAT A DISCHARGE FOR MERELY ENTERING AN AUTHORIZED PRETRIAL INTERVENTION PROGRAM UNDER S.C CODE ANN. §17-22-10, ET SEQ. IS "JUST CAUSE" TO DISQUALIFY A WORKER FROM UNEMPLOYMENT COMPENSATION.

Throughout its Brief, Respondent improperly equates the PTI disposition (and even just the arrest) with a guilty plea. The Respondent argues it is the arrest alone which justifies a discharge for cause and even compares the mere arrest to being able to use a theft conviction for impeachment purposes. (Responsive Brief p. 9). Case law and the employer's own policy reject this approach.

First, the cases relied on by Respondent all involve instances where the claimant was found guilty of the underlying criminal charges. Even then, an analysis based on all facts and circumstances was required to determine whether the conduct was sufficiently

connected to work so as to render the guilty finding a disqualifying event.

Second, the Employer's policy itself provided for an investigation to determine whether the arrest would be considered work related. Under the policy at issue, even a guilty plea would not result in termination if the charge was determined to be not work related. Because the Employer elected not to attend the hearing and present evidence, there is no testimony or evidence that the Employer found the alleged conduct to be work related. The only evidence provided was that of Lippincott and his witness who unequivocally testified that the arrest was not work related and the employer admitted he was terminated solely because he entered a PTI program.

Third, the Respondent's approach also contravenes the applicable statutes and frustrates legislative intent. The Legislature did not intend for persons choosing to accept pre-trial intervention to be penalized as a result of doing so. In addition, a key purpose was to maintain the person's employability so that they would not become a drain on society. S.C. Code Ann. §17-22-150 provides that once a person successfully completes PTI, "the solicitor shall effect a noncriminal disposition of the charge." The person can then apply to get all records pertaining to the arrest destroyed. The statute goes on to state, "(t)he effect of the order is to restore the person, in contemplation of the law, to the status he occupied before the arrest." *Id.* Further, the person is not even required to report the arrest on job applications and the like once the order destroying all official records has been issued. Thus, the disposition of a PTI is more analogous to an acquittal.

Nor should mere speculation about the potential for future criminal activity based merely on an arrest and entry into PTI be allowed to serve as the basis to disqualify a claimant from unemployment benefits. PTI programs are restricted to only those who

meet specific criteria. One of the requirements for the program is that the person be found to be "unlikely to be involved in further criminal activity." (S.C. Code of Laws Ann. §17-22-60) Lippincott met this and all the other requirements for the PTI program. The Respondent's inferences of guilt and the stigma it makes great pains to attach to Lippincott are without basis under the statute and would improperly frustrate implementation of the statute by another governmental entity. Moreover, just as a purpose of PTI is to maintain the earning power of participants, the purpose of the unemployment compensation statute is to maintain the earning power of the unemployed. Accordingly, accepting the government's offer of PTI pursuant to S.C. Code Ann. §17-22-10, et seq., a status to be without penalty to employment and upon determination that the person is unlikely to commit any crime in the future, should not give rise to a governmental disqualification of the person from unemployment benefits under S.C. Code Ann. §41-35-120(2)(a).

II. THE DEPARTMENT ERRED IN MISSTATING THE EMPLOYER'S POLICY AND APPLYING SAID POLICY WITHOUT REGARD TO CONNECTION TO WORK IN VIOLATION OF S.C. CODE §41-35-120(2)(a)?

As set forth above, Appellant was terminated solely for entering a PTI program. Even if disqualification on this basis this did not fatally contravene the statutes involved, the ruling cannot stand. The Employer's own policy clearly requires an investigation when an employee is arrested to determine whether the criminal offense is work related. Although appellant was terminated because his supervisors erroneously believed this was required if he entered PTI, the Employer's policy as written plainly provides for termination upon entry into a PTI program only after a determination that the offense was

found to be work related. The policy is clear that if the offense is not work related, then even a guilty verdict would not necessarily result in termination. (R. pp. 46 - 47)

Despite this clear reading of the policy, the Department misstates the policy and comes up with an entirely new ground for termination alleging in its brief that the "policy requires termination if an associate does not report an arrest within three days after the arrest." (Responsive Brief p. 15) This statement is irrelevant and inaccurate. The time limit to report an arrest is only found under the section entitled "Criminal Drug Statute" and actually states "(i)f an associate fails to notify the company of any arrest or conviction under any criminal drug statute within three days after the arrest or conviction, s/he will be terminated." (emphasis added) (R. p. 47) Thus, this provision did not apply to Lippincott, as the charge was not drug related. The Department cites *Hale v. Neeley*, 335 S.W.3d 599 (Tenn. Ct. App. Nov. 19, 2010) as an example of an employee discharged for cause due to an arrest while on vacation. (Responsive Brief p. 7). *Hale* actually stated that "it is clear that an employee's off-duty drug use (or even an off-duty arrest for drug possession) is not necessarily a breach of duty to the employer, even if the employer has a policy prohibiting the use of drugs on or off-duty." *Id.* at 602 *Hale* was found disqualified, not because of the arrest, but because he violated a known company policy by failing to notify his employer within three days. *Id.* at 603

The only issue in this matter is whether Lippincott violated a known company policy by entering a PTI program regardless of the underlying facts and circumstances and lack of connection to employment. Lippincott testified that he had no knowledge of such a policy. (R. p. 35, line 15 to p. 36, line 9) Further, the policy itself does not provide for automatic termination upon entry into a PTI program. (R. pp. 46 - 47)

The Department's argument that the arrest itself shows Lippincott to be an unfit employee fails. The Employer neither examined the underlying circumstances nor made any determination about the alleged conduct's connection with work. Even if it had done so, as indicated by the case law cited by both parties, a mere demonstration that Lippincott went along with persons who took advantage of him and was arrested as an accessory to their conduct which did not involve any facilities or property of the employer, would not establish work related misconduct. This is particularly true given Lippincott's nearly twenty year work record, complete lack of any criminal record prior to this one incident and eligibility for the PTI program.

In any event, it is unnecessary to reach such issues because the record affirmatively establishes that the Employer's supervisor (who terminated Appellant) mistakenly believed that regardless of whether the alleged offense was work related, she had to terminate Lippincott because he entered PTI. (R. p. 40, line 14 to p. 41, line 2) §41-35-120(2)(a) allows for disqualification for conduct connected to work. Without any evidence or testimony to show even whether the Employer made such a finding, the disqualification cannot be found to be supported by substantial evidence.

III. THE DEPARTMENT ERRED IN IMPROPERLY SHIFTING THE BURDEN OF PROOF, THEREBY PLACING AN IMPROPER BURDEN ON CLAIMANTS IN UNEMPLOYMENT COMPENSATION HEARINGS.

In implicit recognition that the employer failed to offer any evidence sufficient to establish work related misconduct, the Department attempts to salvage its disqualification by arguing that appellant failed to establish that he was not terminated for misconduct. The Department's argument is not only unsupported by the record, it contradicts well-

established law and its own rulings on the burden of proof in unemployment compensation cases.

First, the Department's argument that the policy requirements need not be followed in order to establish a discharge for cause §41-35-120 is baseless. (See Respondent's Brief at p. 12.) Where a discharge is based on a purported violation of a written employer policy, it is axiomatic that the policy must have been reasonably implemented by the employer. *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991) Here, the record affirmatively establishes that the employer did not follow its policy and, therefore, a purported violation of the policy cannot be used as the basis for a disqualification. The only testimony concerning the reason for his discharge was given by Lippincott and his witness. This testimony states that Employer regretted having to let him go but believed that the policy states that discharge was required on the basis of an entry into a PTI program. (R. p. 40, line 14 to p. 41, line 2) Thus, it is evident that no investigation was done and no determination made on whether or not the offense was work related because the policy was misinterpreted. The Employer never made a determination that the conduct was work related. This was required under its own policy. Without a determination and any evidence or testimony that the conduct was work related, Lippincott cannot be disqualified for benefits under state law which requires connection to work.

Second, and most fundamentally, The Department's attempt to shift the burden of proof on disqualification from the employer to the employee is contrary to law. Contrary to the Department's argument, a finding that a worker is disqualified from receiving unemployment compensation must be based on evidence and not the Department's

speculation that “common sense” is enough to show us that Employer not only investigated but “considered sanctions based on a totality of information available to it.” (Respondent’s Brief p. 12) There was no testimony presented by the Employer indicating that there was any investigation or finding that the arrest was work related. Moreover, Respondent’s efforts to use *ex parte* documents to bolster its arguments violate Lippincott’s due process rights. The Respondent’s contention that the documents could be considered “agency records” (Respondent’s Brief p. 10) is specious. They are not records of the agency. They are the Employer’s records. Also, such a contention flies in the face of the Department’s own hearing notice which states that the hearing is *de novo* and that only evidence offered at the hearing will be considered. (R. p. 23).

Respondent’s other arguments concerning these *ex parte* records are equally specious. (Respondent’s Brief pp. 6, 7, 10, 11 and 12) The documents are manifestly hearsay. Respondent has failed to identify a single applicable exception to the hearsay rules. Since they were never offered into evidence there was never a basis nor requirement to raise a formal hearsay objection to them. Faced with the Employer’s refusal to participate in the hearing and the lack of evidence supporting a finding of misconduct, the Department proceeds with the approach that Lippincott had the burden to prove that he was not discharged for cause. (See Respondent’s Brief at p.11 clearing placing burden of proof on Claimant in its statement “Appellant requested neither Agency records nor Subpoena in preparation for his case.”) In addition to this being a clear shifting of the burden, it is not accurate, for in Claimant’s hearing request, he specifically requested the “contents of his file.” (R. p. 24); however, it was never provided. The shift is also seen in Respondent’s concession that there was no evidence of

any investigation conducted by Employer (“no evidence one way or another” Respondent’s Brief p. 11). However, under South Carolina law, the employer bears this burden. Respondent’s assertion that the employer’s mere statement that it is terminating an employee for misconduct suffices to carry its burden is meritless. (*Mickens v. Southland* (*supra*), the court noted that “[the employer] produced no evidence” that the employee engaged in any conduct that could reasonably be deemed to have violated the policy. (*Id.* at 129). Respondent’s fall-back assertion that the employer’s mere statement that it is terminating an employee for misconduct suffices to carry its burden (Respondent’s Brief a p. 12) is patently erroneous, meritless and would effectively eviscerate the burden of proof.

Other states are in accord that the burden of proof is on the Employer to show discharge for cause and not the employee to prove a negative. See, e.g., *Ark. Midland RR v. Director*, 87 Ark. 311, 191 S.W.3d 544 (2004); *Amador v. Unemployment Ins. Appeals Bd.*, 35 Cal. 3d 671, 677 P.2d 224 (1984); *Ward v. Industrial Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995); *Brighton Hotels, LLC v. Gennett*, 2002 Del. Super. LEXIS 372 (2002); *Colton v. District of Columbia Dept. of Employment Services*, 484 A.2d 550 (D.C. 1984); *Dingley v. Boise Cascade Corp.*, 104 Idaho 476, 660 P.2d 941 (1983); *Norland v. Iowa Dept. of Job Services*, 412 N.W.2d 904 (1987); *Holbrook v. Kentucky Unemployment Ins. Comm’n*, 290 S.W.3d 81 (Ky. App. 2009); *City of Monroe v. Tolliver*, 954 So.2d 203 (La. App. 2d Cir. 2007); *Lumpkin v. North Central Airlines*, 296 Minn. 456, 209 N.W.2d 397 (1973); *Shannon Engineering and Construction, Inc. v. MESC*, 549 So.2d 446 (Miss. 1989); *Banal v. Administrator*, 1985 Ohio App. LEXIS 8225, Ct. of Appeals, 7th Dist., Jefferson County (1985); *Babcock v.*

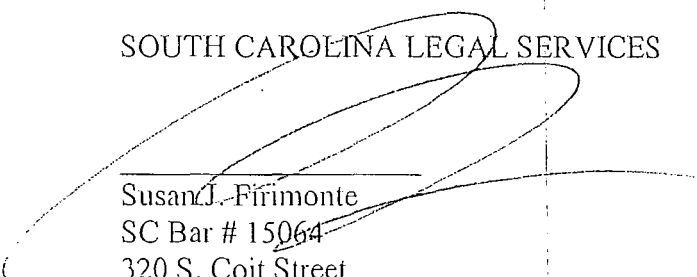
Employment Division, 25 Ore. App. 661, 550 P.2d 1233 (Ct. App. 1976); *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436 (Pa. Cmwlth. 2000); *Allen-Pentkowski v. Dept. of Labor*, 2011 Vt. LEXIS 71, 26 A.3d 55 (2011); *Barkley v. Peninsula Transportation Dist. Comm'n*, 11 Va. App. 317, 398 S.E.2d 94 (1990). Indeed, the Department's own rulings in other cases acknowledge that the employer has the burden of proof to establish a disqualification. (see *Hollis v. Wade's Restaurant*, Decision No.: 2012-P-5, Appeal No. 16490-16491, Appellate Panel Decision dated January 4, 2012, "[t]he employer bears the burden of proving that an employee is discharged for cause.") Here, the employer, who did not even bother to attend the hearing, failed to meet its burden.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities the Order of the Administrative Law Court upholding Appellant's disqualification from unemployment benefits should be reversed and Appellant's benefits should be reinstated without disqualification.

Respectfully submitted,

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Florence, South Carolina

March 7 , 2012

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

William Lippincott, Appellant,

v.

South Carolina Department of Employment and
Workforce and Wal-Mart Associates, Inc., Respondents.

Appellate Case No. 2011-203268

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Unpublished Opinion No. 2013-UP-056
Heard December 12, 2012 – Filed January 30, 2013

AFFIRMED

Susan J. Firimonte, of Florence, for Appellant.

Debra Sherman Tedeschi, of Columbia, for Respondents.

PER CURIAM: William E. Lippincott appeals the Administrative Law Court's (ALC) order affirming the decision of the South Carolina Department of Employment and Workforce (the Department) disqualifying him from receiving unemployment benefits for fourteen weeks based on its finding that Lippincott was terminated for cause connected with his most recent work. Lippincott argues the

ALC erred in 1) depriving him of due process by relying on a conclusory, ex parte hearsay document that was not admitted into the record; 2) shifting the burden of proof to him on the issue of whether he was discharged for cause, 3) finding that he was discharged for cause connected with work based on his participation in a pre-trial intervention (PTI) program, 4) affirming the Department's finding that Wal-Mart Associates, Inc.'s (Wal-Mart) policy regarding arrests and convictions of its employees is reasonable. We affirm.

1. As to Lippincott's claim that the ALC improperly relied upon a conclusory, ex parte hearsay document, we find no error because, contrary to Lippincott's assertion, the ALC did not solely rely upon this document for its ruling. Moreover, the ALC properly relied upon this document along with the other evidence in the record in affirming the Department's finding that Lippincott was discharged for cause connected with his employment with Wal-Mart. *See* 3 S.C. Code Ann. Regs. 47-51 (2011) (mandating that when a party appeals the initial determination of a claims adjudicator, "[t]he [Department's] Appeal Tribunal shall include in the record and consider as evidence all records of the [Department] that are material to the issues.").

2. As to Lippincott's claim that the ALC erred in shifting the burden to him to prove that he was not discharged for cause, we find no error because the facts of the instant case are largely undisputed. Further, our supreme court has not explicitly held that the employer has the burden of proving a claimant was discharged for cause, and under current case law, the claimant has the burden of proving his eligibility for benefits. *See Hyman v. S.C. Emp't 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 he has met the benefit eligibility conditions.").

3. As to Lippincott's claim that the ALC erred in affirming the Department's finding that he was discharged for cause connected with his most recent work, our review of the record indicates that substantial evidence supported this finding. Specifically, the undisputed evidence indicates that Wal-Mart discharged Lippincott because he was criminally charged with accessory to theft and entered into a PTI program as the result of those charges. Accordingly, we find no error in the ALC's ruling on this issue. *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (noting that the APA governs appeals from the Employment Security Commission, the predecessor to the Department); *Michau v. Georgetown Cnty. ex rel. S.C. Cnty. Workers Comp. Trust*, 396 S.C.

589, 593, 723 S.E.2d 805, 807 (2012) ("Under the APA, an appellate court may not substitute its judgment for that of the [Department] as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law."); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367 (noting that the Department's decision will be affirmed if supported by substantial evidence); S.C. Code Ann. § 41-35-120 (2)(b) (Supp. 2012) (requiring the Department to find a claimant partially ineligible for unemployment benefits if it finds that he has been "discharged for cause . . . connected with his most recent work"); *Milliken & Co., Pendleton Plant v. S.C. Emp't Sec. Comm'n*, 315 S.C. 492, 497, 445 S.E.2d 640, 644 (Ct. App. 1994), *rev'd on other grounds*, 321 S.C. 349, 468 S.E.2d 638 (1996) ("[T]he question of whether conduct is connected with work necessitates a case by case analysis.").

4. As to Lippincott's claim that the ALC erred in affirming the Department's finding that Wal-Mart's policy regarding arrests and convictions of its employees is reasonable, we find this ruling was supported by substantial evidence. *See Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 130, 406 S.E.2d 363, 365 (1991) ("[T]he general rule is that, where the employer's request is *reasonable*, a refusal to comply will constitute misconduct, justifying a discharge for cause. What is reasonable will vary according to the circumstances of each case." (citations and internal quotation marks omitted)).

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
South Carolina Administrative Law Court

John D. McLeod, Administrative Law Judge

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SC Court of Appeals

Appellate Case No.: 2011-203268

William Lippincott,

Petitioner,

v.

South Carolina Department of Employment and Workforce
And Wal-Mart Associates, Inc.,

Respondents.

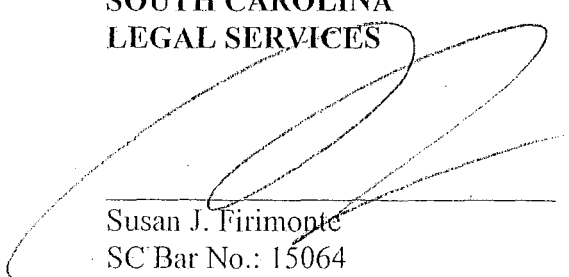
PETITION FOR REHEARING

The Petitioner, William Lippincott, by and through his undersigned counsel, respectfully petitions this Court pursuant to Rule 221 of the Appellate Court Rules, for a rehearing in this matter. As detailed in the accompanying Memorandum, the Appellant would show that points have been misapprehended or overlooked by the Court. The Appellant has previously been granted *in forma pauperis* status in these proceedings and respectfully requests that this motion also be filed without cost to him.

February 8, 2012

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from
South Carolina Administrative Law Court
John D. McLeod, Administrative Law Judge

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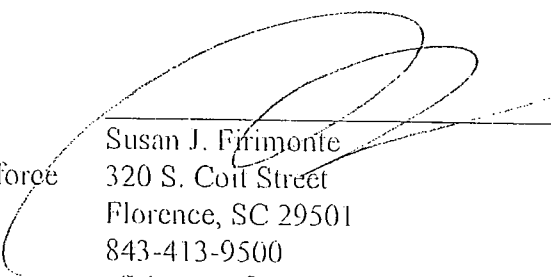
Respondents.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

February 8, 2013

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MEMORANDUM

I. INTRODUCTION

This is an appeal of a Decision of the Administrative Law Court affirming a denial of Lippincott's unemployment compensation benefits. Lippincott was discharged then denied unemployment compensation benefits on the sole basis that he notified his employer he was entering a PTI program. Lippincott's one and only run in with the law occurred while he was on vacation and had no impact on his work. The employer elected not to attend the unemployment compensation hearing and, therefore, offered no testimony or evidence in the matter. Nevertheless, multiple records submitted by the employer to the Department prior to the hearing were included in the record on appeal. These records were never provided to Lippincott or his attorney prior to or during the hearing and were never offered into evidence in his case. Lippincott's testimony, supported by his witness, (the only testimony presented at the hearing) was that the only reason he was discharged was because he was entering PTI. This basis alone is not cause for discharge under Wal-Mart's own policy. Disqualifying Lippincott from unemployment benefits on this basis alone contravenes the intent and purpose of the PTI Statute. The burden of proof was improperly shifted to Lippincott to prove he was not discharged for cause. This burden shift, combined with the allowance of records never entered into evidence to be used against him deprived Lippincott of the fair hearing he was entitled to under the law.

II. FACTS

Lippincott began working for Employer on May11, 1992 (ROA p. 27 line 23 to p. 28 line 1) as a sales associate. The Employer discharged him on January 31, 2011 alleging

he violated the company policy pertaining to associate arrests. (ROA p. 31, lines 17-19) The Decision of the Administrative Hearing Officer stated that Lippincott violated the company policy by entering into a deferred prosecution program. (ROA p. 45)

The hearing was not attended by the Employer, who elected to leave at its commencement and presented no testimony or evidence. (ROA p. 45) Lippincott testified that he had a first-time arrest for accessory to a criminal offense while he was on vacation and that the incident itself had no relation to or bearing on his work. (ROA p. 28, lines 3-12, p. 32, lines 10-12, p. 35, lines 12-14) Lippincott opted to participate in the Pre-Trial Intervention (PTI) program (for which he was eligible because he had no previous arrests). Lippincott's father testified that Lippincott had been diagnosed with mental retardation as a child (ROA p. 37, lines 6 – 8), that he "had no problems in my life with him as a son except for this one instance." (ROA p. 37, lines 9 - 10) Lippincott testified that he was discharged and told by the Employer that the reason he was discharged is that their policy requires that any employee entering a PTI program be discharged. (ROA p. 27, line 21) Lippincott's father also testified that the manager came out after the discharge conference and stated that Lippincott was let go only because he entered into the PTI program. (ROA p. 36, line 14 to p. 35 line 2)

ARGUMENT

- I. THE ADMINISTRATIVE LAW COURT DEPRIVED APPELLANT OF PROCEDURAL DUE PROCESS WHEN IT FOUND HE WAS DISCHARGED FOR CAUSE BASED UPON A DOCUMENT SUBMITTED BY THE EMPLOYER WHICH WAS NEVER ADMITTED INTO THE RECORD IN THIS CASE.

The Administrative Law Court reliance on evidence not admitted into the record in

this matter to find that Lippincott was discharged for cause deprived Lippincott of due process and a fair hearing. The Order of the Administrative Law Court states: "(a)s to the evidentiary support for Wal-Mart's application of its arrest and convictions policy, the Appellant's exit interview states that "Associate violated associate arrest and convictions policy." (ROA p. 4-5) By using a document submitted by the Employer but never entered into evidence, Lippincott was denied procedural due process. He was never given an opportunity to review the document, object to the document, cross examine the drafter of the document or even present testimony to rebut the document. Our Courts have held that due process is required even in administrative proceedings. "A fair trial in a fair tribunal is a basic requirement of due process, (and) this applies to administrative agencies which adjudicate as well as to courts." *Garris v. Governing Board of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998) The Constitution of South Carolina, in Article I, Section 22, specifically grants due process in administrative hearings. By using documents never admitted into the record, the Administrative Law Court violated Lippincott's procedural due process rights and violated *S.C. Code Ann. §1-23-360* which specifically prohibits *ex parte* communications by adjudicators. The document, which was included in the file but never provided to Lippincott, was *ex parte*. It is clear from the Order of the Administrative Law Court that this document was relied upon as substantial evidence that the discharge was for cause.

The Administrative Law Court took this statement and not only inferred a conclusion of policy violation, but had to also infer that the Employer properly applied and followed its own policy. These inferences, which were given to the Employer in this matter, rest in sharp contrast to the inference of non-compliance placed upon Lippincott. Because the

Employer did not appear at the hearing, Lippincott could not cross examine the Employer regarding the application of its policy and whether the Employer failed to properly apply same. The use of the *ex parte* document and the Administrative Law Court's interpretation thereof deprived Lippincott the fair and impartial hearing to which he was entitled.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN SHIFTING THE BURDEN OF PROOF TO THE PETITIONER ON THE ISSUE OF WHETHER HE WAS DISCHARGED FOR CAUSE UNDER THE STATUTE.

S.C. Code § 41-35-120(2)(a) states that a claimant may be partially or fully disqualified from unemployment benefits if discharged "for cause connected with his most recent work." The plain language of the statute, as well as fundamental principles of statutory interpretation and relevant case law, clearly show that the statute does not contemplate "cause" to include a one-time mistake of judgment and was never intended to apply to conduct of the employee that has no connection to his employment, as in the present case.

The burden of proof of the misconduct is on the Employer to show that Lippincott committed an act which would justify discharge for cause. In the instant case, the Employer presented no testimony or evidence regarding whether the conduct of Lippincott, which occurred while he was on vacation, was connected to work. The only testimony that was heard at the hearing stated that the employer had fired Lippincott only because he was entering a PTI program. The Administrative Law Court erred as a matter of law in not allocating the burden of proof to the Employer.

The presumption that all claimants are guilty of being terminated for cause unless they to prove their innocence, is exactly what the Administrative Law Court set out in the

Order. The Administrative Law Court refused to address the improper burden shifting which has occurred, deferring to *Hyman v. S. Carolina Employment Sec. Comm'n*, 234 S.C. 369, 373 s.e.2D 554, 556 (1959). This case does not stand for shifting the burden of proof that a claimant has been discharged for cause in unemployment compensation hearings to the claimant. A clear reading of this case states that a claimant seeking unemployment benefits must prove that they are ready, willing and able to work. The claimant in *Hyman* was penalized unemployment because he failed to show he was available for work. The case cites a Virginia Supreme Court of Appeals which states, "the burden is on the claimant to show that he has met the benefit eligibility conditions, which in this case is unrestricted availability for work." *Unemployment Compensation Commission v. Tomko*, 192 Va. 463, 65 S.E.2d, 524, 527, 25 A.L.R.2d 1071 cited in *Hyman supra*. It is undisputed that a claimant filing for unemployment must show availability for work to be eligible for benefits. Eligibility must first be established before proceeding to whether a claimant should be disqualified for benefits. This two step process is consistent with the progeny of *Tomko*, as held in *Dan River Mills, Inc. v. Unemployment Compensation Commission*, 195 Va. 997, 81 S.E.2d 620 (1954) which stated "(t)he contention of the appellant-employer confuses the conditions for eligibility for benefits under section 60-46 with the grounds for disqualification for benefits under section 60-47. ... A claimant must be eligible for benefits before his disqualification need be inquired into. *Id.* 1001, 622. Requiring a claimant to prove he should not be disqualified, imposes an unreasonable burden and establishes an unfair presumption against a claimant.

III. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN FAILING TO ASSESS WHETHER THE POLICY (AS APPLIED BY THE DEPARTMENT) IS REASONABLE UNDER THE STATUTE.

South Carolina allows for a violation of an employer's policy to serve as grounds for discharge for cause sufficient to support a disqualification from unemployment benefits only where the employer's policy is reasonable. The policy as interpreted and applied by the Department in this matter is not reasonable and should not be used as a basis for disqualification of unemployment benefits. The Administrative Law Court also refused to address this issue.

The evidence and testimony presented at the hearing base the termination of Lippincott solely on his entrance into a PTI Program. (ROA p. 27, line 21) The policy of the Employer does not provide for termination on this basis. Nevertheless, the Department either completely ignored the policy's distinction between job-related and non-job related criminal charges or applied the presumption against Lippincott that the criminal offense was job related. As applied by the Department, the policy provides for discharge no matter what the criminal charge and whether or not it is work-related even if the charges are dismissed pursuant to a PTI program. That result is simply unreasonable.

While an Employer is free to set any policy for discharge that it chooses, that policy (if it is unreasonable) should not be grounds for disqualification from the government benefit of unemployment compensation. The South Carolina courts have addressed this issue. In *Mickens v. Southland*, 305 S.C. 127, 406 S.E.2d 363 (1991) the court found the employer's policy unreasonable and held that the Court must review the reasonableness of an employer's policy in unemployment cases where the policy violation is being used as the ground to deny a claimant benefits. *Id.* at 130.

If the interpretation of the policy by the Department were allowed to stand, the policy would, as a matter of law, be unreasonable and inconsistent with the statute. The statute is clear and unambiguous. The conduct must be connected to work. That connection never existed in this case. The policy, as applied by the Department, provides for discharge without regard to connecting the alleged conduct to work. While an employer may discharge an employee for violating its policy, for the purposes of eligibility for unemployment benefits, the policy must be consistent with South Carolina law.

Further, the Employer's policy, as applied by the Administrative Law Court, would disqualify any employee who entered a PTI program, no matter what the underlying charge. The entire purpose of the PTI program would, thus, be thwarted by such an interpretation. The PTI program is in place to provide a second chance for first time offenders who have the best chance to avoid any future criminal legal issues. The purpose is to prevent recidivism by keeping persons who are otherwise law abiding from entering a criminal justice system and becoming a criminal. The PTI program is designed to minimize the impact on the person's employment which is hoped to be maintained to prevent them from falling onto the public rolls and be more vulnerable to the temptations of criminal activity. A policy that mandates discharge for any employee entering a PTI program, without regard to the underlying offense, is simply unreasonable and contrary to the public interests. Such a policy should not be used to prevent an employee from receiving unemployment compensation benefits.

The Tennessee Supreme Court dealt with the issue of policy violation and criminal charges in the unemployment context in *Hale v. Neeley*, 335 S.W.3d 599, (Tenn.

Ct. App. Nov. 19, 2010) In *Hale*, the claimant challenged his disqualification, which found that he violated employer's policy by being convicted of a misdemeanor possession of cocaine. The Court in *Hale* actually held that "an employee's off-duty drug use (or even an off-duty arrest for drug possession) is not necessarily a breach of duty to the employer, even if the employer has a policy prohibiting the use of drugs on or off-duty." *Id.* at 602. The Court went on to state that had the conviction been Mr. Hale's only issue, "Mr. Hale would have been guilty of violating a duty owed to society in general" and not be disqualified from benefits. *Id.* at 603. In *Hale*, the claimant had signed written acknowledgement of the employer's policy and those were submitted into evidence by the employer, together with testimony that the claimant was advised of and signed off on the policy at issue. *Id.* at 603. By contrast, the Employer in the instant matter made no such proffer. What is in evidence in this matter is that Lippincott did not have knowledge of the policy at issue and was not notified that he would be discharged if he entered a PTL program until his actual discharge by Employer. (ROA p. 10, lines 3 – 9, and lines 19 – 21). Thus, there is no evidence that Lippincott knowingly violated any policy:

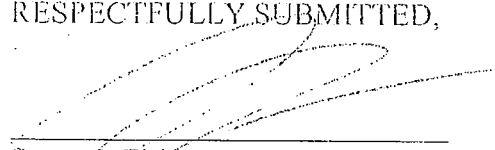
III. CONCLUSION

Every claimant denied unemployment compensation benefits is entitled to a fair hearing. A fair hearing cannot be held where the employer has secretly submitted documents and evidence against the claimant which are used for disqualification. A fair hearing cannot be held where the employer is relieved of the burden of proving that the claimant was discharged for cause. The misapplication of the burden to the claimant includes a presumption that claimant was discharged for cause and now must prove his

innocence. The application of such a presumption is a patent denial of due process. Lippincott was this claimant and was denied a fair hearing in this matter. Had the employer been held to the proper burden of proof and presumptions against Lippincott not been allowed, he would have been found entitled to unemployment compensation benefits. The Decision of the Administrative Law Court must be reversed and benefits awarded accordingly.

February 8, 2013

RESPECTFULLY SUBMITTED,



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843-413-9500

ATTORNEYS FOR PETITIONER

TABLE OF AUTHORITIES

CASES

<i>Dan River Mills, Inc. v. Unemployment Compensation Comm'n</i> , 195 Va. 997, 81 S.E.2d 620 (1954)	5
<i>Garris v. Governing Board of S.C. Reinsurance Facility</i> , 313 S.C. 432, 511 S.E. 2d 48 (1998)	3
<i>Hale v. Neeley</i> , 335 S.W.3d 599 (Tenn. Ct. App. Nov. 19, 2010)	7, 8
<i>Hyman v. S.C. Employment Sec. Comm'n</i> , 234 S.C. 369, 373 S.E.2d 554 (1959)	5
<i>Mickens v. Southland Exchange-Joint Venture and S.C. Employment Sec. Comm'n</i> , 305 S.C. 127, 406 S.E.2d 363 (1991)	6
<i>Unemployment Compensation Comm'n v. Tomko</i> , 192 Va. 463, 65 S.E.2d 524, 25 A.L.R.2d 1071 (1951)	5

STATUTES AND OTHER AUTHORITY

S.C. Code §1-23-360.....	3
S.C. Code § 41-35-120(2)(a).....	4
S.C. Const., art. I, §22	3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No.: 2011-203268

William Lippincott,	Petitioner,
	v.
South Carolina	
Department of	
Employment and	Respondents.
Workforce and Wal-	
Mart Associates, Inc.,	

RETURN IN OPPOSITION TO PETITION FOR REHEARING

Respondent, the South Carolina Department of Employment and Workforce (SCDEW) opposes Petitioner's Petition for Rehearing.

In an Unpublished Opinion, this Court affirmed an Order of the Administrative Law Court (ALC) which upheld SCDEW's final administrative decision disqualifying Petitioner from receiving 14 weeks of unemployment benefits. *Lippincott v. SCDEW*, No. 2013-UP-056 (S.C. Ct. App. filed Jan. 30, 2013).

Pursuant to Rule 221(a), SCACR, a petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." The Petition for Rehearing merely restates Petitioner's arguments that have already been considered by this Court in the briefs, as well as the oral argument.

Petitioner has not stated “with particularity” anything this Court has overlooked or misapprehended. Because the Court has already specifically ruled upon Petitioner’s individual issues, and Petitioner raises nothing new in the Petition for Rehearing, this Court should deny rehearing.

Furthermore, the Court correctly ruled on the issues raised by Petitioner in his rehearing petition.

First, Petitioner maintains he was deprived due process when the ALC relied on evidence “never entered into the record.” However, this Court properly held that (1) the ALC did not solely rely on the document for its ruling; and (2) pursuant to S.C. Code Ann. Regs. § 47-51, the record includes “all records of [SCDEW] that are material to the issues.”

Second, Petitioner contends the ALC shifted the burden of proof to him to show he was not discharged for cause. The Court accurately noted that there is no dispute in this record as to the salient facts of the case, and therefore no burden was shifted.

In addition, Petitioner’s true argument is not about the burden of proof, but largely a difference of opinion as to whether his actions were “connected to work.” Under the standard of review, SCDEW’s findings “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). This Court correctly ruled in its opinion there is substantial evidence to support SCDEW’s finding

that Petitioner was discharged for cause connected with work. Therefore, there is no reason to rehear this issue.

Finally, Petitioner claims the ALC erred in finding Wal-Mart's discharge policy related to an employee's arrests and convictions is reasonable. However, the Court specifically found this issue was also without merit because the substantial evidence supported the reasonableness of Wal-Mart's policy.

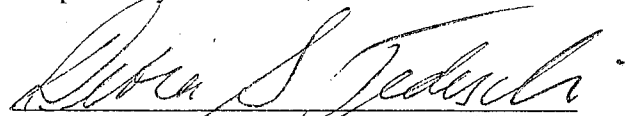
Thus, no issue raised in the Petition for Rehearing warrants consideration by the Court. This Court and the ALC both have correctly addressed the same issues raised by Petitioner and found substantial evidence supports SCDEW's decision that Petitioner was discharged for cause.

Accordingly, the Court should deny Petitioner's request for rehearing.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Rehearing.

Respectfully submitted,



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Attorney for Respondent SCDEW

March 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Appellate Case No. 2011-203268

William Lippincott,

Appellant,

v.

South Carolina Department of
Employment and Workforce,

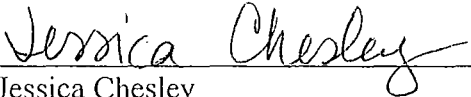
Respondent.

PROOF OF SERVICE

I certify that I have served the Respondents Return in Opposition to Petition for Rehearing on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on March 4, 2013, addressed to the Attorney for the Appellant at their address of record:

Susan J. Firimonte, Esq.
320 S. Coit Street
Florence, SC 29501-4746

March 4, 2013


Jessica Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202

The South Carolina Court of Appeals

William Lippincott, Appellant,

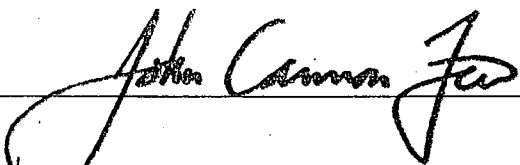
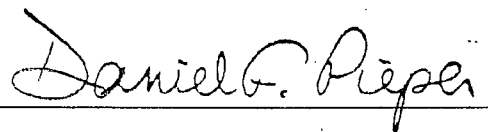
v.

South Carolina Department of Employment and
Workforce and Wal-Mart Associates, Inc., Respondents.

Appellate Case No. 2011-203268

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Susan J. Firimonte

Debra Sherman Tedeschi

FILED

12 March 2013