THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
The Administrative Law Court

John D. McLeod, Administrative Law Judge

Unpublished Opinion No. 2013-UP-056 (Filed January 30, 2013)

William Lippincott,

Petitioner,

v.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 12, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that Petitioner was denied a fair hearing when the burden of proof was shifted to Petitioner to prove he was not discharged for cause?

2. Did the Court of Appeals err in failing to find it a violation of due process to allow employer's statements and documents to be made part of the record in this matter when said documents were never provided to Petitioner or even entered into the record at the hearing?

3. Did the Court of Appeals err in failing to find that a denial of unemployment benefits on the basis of an employee's entrance into a PTI program alone was in violation of the statute requiring that the alleged conduct be related to work?

INTRODUCTION

This is an appeal of an Order issued by Court of Appeals affirming a denial of Lippincott's unemployment compensation benefits. Lippincott, who overcame intellectual disabilities, worked at Wal-Mart for nearly twenty years before he was discharged, then denied unemployment compensation benefits solely on the basis that 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. Despite a request for the file prior to the hearing, 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 to which he was entitled and, as a result, his unemployment compensation benefits.

STATEMENT OF THE CASE

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, lines10-12, 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

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. 15 line 2) The Court of Appeals affirmed the decision below in its Unpublished Decision No. 2013-UP-056, filed January 30, 2013. A timely Petition for Rehearing was filed asserting the significant legal errors below in denying Lippincott a fair hearing, improperly shifting the burden of proof, allowing patent hearsay documents to be secretly entered into the record (without notice and without providing same to the other party), and in finding that entrance into a PTI program, standing alone, can be used as the basis for a disqualification for benefits. The Court of Appeals declined to grant a Rehearing in its Order filed March 12, 2013. Petitioner seeks a writ of certiorari to review that decision.

ARGUMENTS

1. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE PETITIONER WAS DENIED A FAIR HEARING BECAUSE THE EMPLOYER'S BURDEN OF PROOF THAT PETITIONER WAS DISCHARGED FOR CAUSE WAS IMPROPERLY PLACED ON LIPPINCOTT.

The burden to prove that an employee has committed misconduct connected to work is on the employer. An employer must show that an employee committed an act which would justify discharge for cause. In the instant case, the Employer presented no testimony or evidence at all, let alone any 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 Court of Appeals 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 its Order and the Court Appeals affirmed in refusing to address this issue. The Court of Appeals 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) and stating that "our supreme court has not explicitly held that the employer has the burden of proving a claimant was discharged for cause." (Unpublished Opinion 2013-UP-056 p. 2)

Hyman 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. Once shown, the burden is now on the employer to prove that the claimant was discharged for cause connected to work. 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. The Court of Appeals erred in failing to correct the misinterpretation of ***Hyman*** evidenced by the Administration Law Court in this case.

2. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT IT WAS A VIOLATON OF LIPPINCOTT'S DUE PROCESS RIGHTS TO HAVE ALLOWED EMPLOYER'S SUBMISSIONS INTO THE RECORD WITHOUT ANY NOTIFICATION TO LIPPINCOTT AND WITHOUT PROVIDING LIPPINCOTT WITH A COPY OF SAME.

The Court of Appeals erred in finding that the ALC properly relied on evidence not admitted into the record in this matter to find that Lippincott was discharged for cause. The Court of Appeals reasoned that there was no error because the department's regulations state that they may "include in the record and consider as evidence all records of the (Department) that are material to the issues." (Unpublished Opinion p. 2) This position by the Court of Appeals is directly contradicted by the Department's own notice sent out to both claimants and employers prior to the hearing. This notice entitled, Notice of Hearing Before Appeal Tribunal, includes the following language: "No testimony or evidence will be considered from witnesses who are not present." (ROA p. 23) In

Lippincott's case, Wal-Mart did not appear, elected not to attend to present any testimony or evidence. Further, at no time prior to, during or following the hearing did the Hearing Officer advise that there were any exhibits or documents previously submitted by the employer that would go into the record. As the transcript indicates, the only exhibit offered by the Hearing Officer was the Determination by Claims Adjudicator (ROA p. 4, line 21 to p. 5, line 9)

By using documents submitted by the Employer but never entered into evidence to determine eligibility for unemployment compensation benefits, Lippincott was denied procedural due process. He was never given an opportunity to review the documents, object to the documents, cross examine the drafter of the documents or even present testimony to rebut the documents. 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, Lippincott's procedural due process rights and ***S.C. Code Ann. §1-23-360*** which specifically prohibits *ex parte* communications by adjudicators were violated. The documents in this matter were *ex parte*. It is clear from the Order of the Administrative Law Court that these documents were relied upon as substantial evidence that the discharge was for cause.

The Administrative Law Court's decision clearly shows that these records were not only relied upon in finding Lippincott discharged for cause but given greater weight

than the testimony of the witnesses who actually attended the hearing. Further, an improper inference was granted to the employer of a policy violation. The ALC stated in its decision, "inherent in Wal-Mart's statement is the conclusion that Wal-Mart in fact applied its policy." (ROA p. 5) 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* documents, and the ALC's interpretation of them, deprived Lippincott the fair and impartial hearing to which he was entitled.

3. THE COURT OF APPEALS ERRED AS A MATTER OF LAW WHEN IT AFFIRMED A DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS ON THE BASIS OF ENTRANCE INTO A PTI PROGRAM ALONE AND WITHOUT ANY EVIDENCE THAT THE CONDUCT WAS RELATED TO WORK AS REQUIRED BY 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.

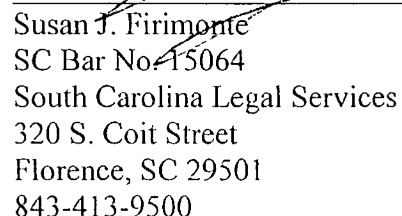
The Tennessee Supreme Court dealt with the issue of policy violation and criminal charges in the unemployment context in ***Hale v. Neeley***, 335 S.W.3d 599, (Tenn. Ct. App. Nov. 19, 2010) In ***Hale***, the claimant challenged his disqualification, which found that he violated employer's policy by 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 PTI 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.

CONCLUSION

Every claimant denied unemployment compensation benefits is entitled to a fair hearing. A fair hearing cannot be had where the employer has secretly submitted documents and evidence against the claimant which are used for disqualification. A fair hearing cannot be had 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 Court of Appeals must be reversed and benefits awarded accordingly.

Respectfully submitted,



April 1, 2013

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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on the following parties by depositing a copy of it in the United States mail, postage prepaid on April 1, 2013 addressed to their counsel or designated representative as follows:

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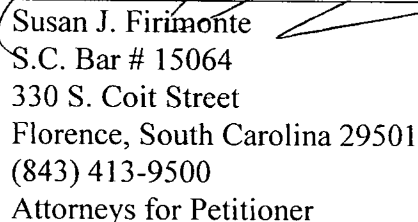

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